88-1601

No. 88-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PULLMAN-STANDARD, INC., A SUBSIDIARY OF THE PULLMAN COMPANY,
Petitioner,

—v.—

LOUIS SWINT, and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In light of *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988), did the Court of Appeals err in (a) allowing plaintiffs to establish a disparate impact challenge to a subjective, multicriteria selection system for supervisor promotions through a gross, "bottom line" comparison between the percentage of black supervisors and the percentage of blacks in the workforce, rather than a comparison to the subgroup of promotion-eligible black workers; (b) shifting to the employer the burden of persuasion to prove the necessity of its requirements for such promotions; and (c) improperly commingling disparate treatment and disparate impact theories?

2. Did the Court of Appeals violate the strictures of *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), as well as the requirements of Article III of the Constitution, in allowing employees who were hired before the effective date of Title VII of the Civil Rights Act of 1964, and who never asserted individual claims of discriminatory denial of a supervisor promotion, to serve as representatives of a class challenging allegedly discriminatory post-Title VII initial assignments and promotion practices?

3. Did the Court of Appeals ignore this Court's ruling in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), by reaffirming its 1980 decision (a) overturning the District Court's findings on the absence of discriminatory intent in the Company's initial departmental assignments and on the business necessity of the Company's requirements for supervisor promotions, and (b) substituting its own independent determination on these issues rather than remanding to the District Court for appropriate findings?

4. In light of *Owens* v. *Okure*, 109 S. Ct. 573 (1989), did the Court of Appeals err in measuring the liability period for the 42 U.S.C. § 1981 claim by reference to Alabama's six-year "nonresidual" statute for personal injury actions?

LIST OF PARTIES

Petitioner Pullman-Standard, Inc. ("Pullman" or "the Company") is a subsidiary of The Pullman Company. Respondents are Louis Swint and Willie James Johnson, as representatives of a certified class of "all black persons who at any time subsequent to one year prior to the filing of any charges with the [Equal Employment Opportunity Commission] had been employed by Pullman (at its Bessemer[, Alabama] plant) as production and maintenance workers in positions represented by the United Steelworkers."*

Pursuant to Rule 28.1, petitioner informs the Court that The Pullman Company is wholly owned by Pullman Holding Corporation, which is in turn wholly owned by Affiliates of Forstmann Little & Company, a limited partnership.

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* *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 948 n.20 (N.D. Ala. 1974) (App. 94a). The decision sought to be reviewed consolidated three appeals (Nos. 87-7057, 86-7886 & 84-7319). This petition seeks review only of appeals No. 87-7057 and No. 86-7886.

Copies of this petition also have been served on counsel for Clyde Humphrey, who was listed as a party in the caption of the ruling below even though his individual claim as intervening plaintiff had been decided against him on August 30, 1976, and he had not been served with notices of appeal or court papers since that date; for United Steelworkers of America, AFL-CIO, Local 1466 of the United Steelworkers of America, AFL-CIO, and International Association of Machinists, AFL-CIO, who were defendants-appellees in the decision sought to be reviewed; and for William B. Larkin, Louise Seals, purportedly as personal representative of Spurgeon Seals, deceased, Lillie Lofton, purportedly as personal representative of Edward Lofton, deceased, and Jesse B. Terry, who were plaintiffs-appellants in appeal No. 84-7319.

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No. 88-____

PULLMAN-STANDARD, INC., A SUBSIDIARY OF THE PULLMAN COMPANY,

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—v.—

LOUIS SWINT, and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action in appeal Nos. 87-7057 and 86-7886.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 854 F.2d 1549, and is reprinted in the Appendix ("App.") hereto at p. 1a. The unreported memorandum opinions of the District Court (N.D. Ala.) dated September 8, 1986 and November 26, 1986 are reprinted at App. 262a-285a. Prior rulings in this litigation relevant to this petition are described below and reprinted in the Appendix.

JURISDICTION

The decision of the Court of Appeals (App. 1a–61a) was entered on September 21, 1988 and a timely petition for rehearing was denied on January 3, 1989 (App. 289a–291a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent text of Article III of the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and Rules 23(a) and 52(a) of the Federal Rules of Civil Procedure is set out at App. 292a–298a.

STATEMENT OF THE CASE

This litigation was previously before this Court in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (App. 231a–258a), which held that a 1980 ruling of the then Fifth Circuit,[3] reversing a determination of the trial court, had transgressed the limits of proper appellate review by substituting its own findings on the question of the legality of the seniority system maintained at Pullman's Bessemer, Alabama plant.[4] The instant petition seeks review of the now Eleventh Circuit's decision reversing, once again, the trial court by ruling that Pullman's supervisor promotions from 1966 to 1974 worked an unjustified disparate impact under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, and that its departmental assignments of new hires from 1965 to 1969 were "infected" by intentional racial discrimination in violation of Title VII and 42 U.S.C. § 1981 ("§ 1981"). That decision imposes liability on Pullman on the basis of the very *de novo* appellate factfinding this Court rejected in *Swint* by means of

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3 *Swint* v. *Pullman-Standard* (*Swint VI*), 624 F.2d 525 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982) (App. 207a–230a).

4 Until it closed in 1980-81, Pullman's plant in Bessemer, Alabama manufactured special order railway freight cars and parts.

an analysis that fails even to take account of, let alone apply, this Court's intervening decision in *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988).

A. Class Certification

In December 1971, Louis Swint and Willie James Johnson filed a class action alleging that Pullman and the United Steelworkers of America, AFL-CIO and its Local 1466 (collectively "USW") had engaged in racially discriminatory employment practices in violation of Title VII and § 1981. Plaintiffs focused their challenge on the departmental seniority system maintained under Pullman's collective bargaining agreements with the USW (covering 26 departments) and with the International Association of Machinists, AFL-CIO ("IAM") (covering 2 departments), claiming it unlawfully perpetuated the effects of pre-Title VII discrimination.

Under the Fifth Circuit's then prevailing "across-the-board" approach to Title VII class actions, the District Court certified, without a hearing, Swint and Johnson as representatives of a class[5] with respect to four "class issues": (1) whether the departmental seniority system perpetuated the effects of past discrimination in the assignment of black employees among the various departments; (2) whether there had been discrimination in the assignment of work to persons within the same department; (3) whether there had been discrimination in promotions to supervisory positions; and (4) whether there had been discrimination in the failure to post changes in assignments.[6] The District Court's determination that there was no discrimination

5 The class was defined as "all black persons who at any time subsequent to one year prior to the filing of any charges with the EEOC had been employed by Pullman (at its Bessemer plant) as production and maintenance workers in positions represented by the United Steelworkers." *Swint v. Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 948 n.20 (N.D. Ala. 1974) (App. 94a).

6 In the same action, Swint and Clyde Humphrey as intervenor-plaintiff asserted individual claims challenging their discharges. The District Court found that there was no racial discrimination or unlawful retaliation in connection with their discharges, and this determination was affirmed on appeal. *Swint v. Pullman-Standard* (*Swint II*), 539 F.2d 77, 105 (5th Cir. 1976) (App. 139a).

on issues (2) and (4) was sustained on appeal. With respect to issue (1), following this Court's *Swint* decision, the District Court upheld the seniority system under Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), and was affirmed by the Eleventh Circuit.

As the litigation evolved, however, an independent issue emerged concerning whether Pullman had engaged in intentional post-Act discrimination in its departmental assignments of new hires ("initial assignments"), which, along with the supervisor promotions issue, are the subject of this petition. However, since both of the named plaintiffs were hired before the effective date of Title VII,[7] neither had a personal stake, at the time of certification, in the challenge to post-Act initial assignments. Moreover, neither of the named plaintiffs had ever alleged an individual claim of discriminatory denial of a supervisory position[8] and hence lacked a personal stake in the promotions challenge as well.[9]

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7 Title VII became effective on July 2, 1965. Swint was hired on November 24, 1964; Johnson was hired on January 12, 1956 (1974 Tr. 884, 1054; App. 298a-299a, 300a).

8 Indeed, while an employee, Swint actively encouraged other black employees to reject offers of promotion to supervisor (1974 Tr. 1775-76, 2505-07, 2550-53; App. 300a-305a), was known to regard those blacks who were supervisors as "Uncle Toms" (*id.* 2505-07, 2550-53; App. 302a-305a), pressured black supervisors to resign their positions (*id.* 3206-8; App. 305a-306a), and, as the trial court found, was discharged because of "insubordination . . . directed toward a black foreman," *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 960 (N.D. Ala. 1974) (App. 88a); Johnson was made a temporary foreman at one point and was offered a foreman position in 1974 which he declined because of poor health (1974 Tr. 899, 938; App. 299a-300a).

9 In 1975, four other black employees (William Larkin, Spurgeon Seals, Edward Lofton and Jesse Terry) filed a race discrimination suit against Pullman. Their appeal (No. 84-7319) from the District Court's denial of their motion under Fed. R. Civ. P. 60(b)(6) to transform a 1976 dismissal with prejudice into a dismissal without prejudice was affirmed by the Eleventh Circuit below. The Court of Appeals reasoned that there was no justification for reopening their case, that the interests of the "*Larkin* plaintiffs" were amply represented in the *Swint* class, and that any additional evidence

B. 1974 Trial and Appeal

After sixteen days of testimony and submission of numerous exhibits, the District Court in 1974 concluded, *inter alia*, that plaintiffs had not proven that the seniority system was unlawful or that the selection of supervisors was discriminatory. *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 961 (N.D. Ala. 1974) (App. 90a). Concerning departmental assignments, the District Court found that because of a 1965 arbitration award opening up previously all-white jobs to blacks, "the company began implementing a program to eliminate barriers to advancement by blacks. . . ." *Id.* at 947 (App. 65a). This effort included an agreement with the Department of Labor, establishing procedures for integrating previously segregated departments, and providing seniority carryover rights for black employees hired prior to 1965 who transferred to formerly all-white departments as well as preferential promotion rights in certain departments. The court further determined that "the company's assignments from 1965 to 1974 discloses an obvious effort . . . to 'correct' the racial imbalances in the departments. Those departments which in 1965 had been predominantly of one race are, without exception, closer in 1973 to the racial ratio for the plant as a whole; and those departments which had been exclusively of one race are, with one exception, no longer 'segregated.'" *Id.* at 951 (App. 71a).[10] The court found, however, that Pullman had violated Title VII insofar as

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of discrimination could have been readily presented through the *Swint* litigation. *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549, 1583-84 (11th Cir. 1988) (App. 59a-60a). The same counsel represented both the *Larkin* plaintiffs and the *Swint* class. *See Swint* v. *Pullman-Standard* (*Swint IX*), No. CV 71-P-0955-S, slip op. at 3 n.6 (N.D. Ala. Sept. 8, 1986) (App. 264a-265a).

10 The court here referred to the Janitors department where two whites had been assigned during the 1965-73 period but subsequently quit. *Swint I*, 11 FEP Cas. at 951 (App. 71a).

six departments remained of single-race composition up until June 1971. *Id.* at 953-54 (App. 77a).[11]

With respect to supervisor promotions, the District Court found that salaried foremen—positions outside of the bargaining unit—were chosen from the ranks of successful hourly (or temporary) foremen, and that "approximately 20% of [salaried foremen] promotions since mid-1965 have been of blacks, a percentage that is not really disproportionate to the composition of the source group when one takes into account the pre-1965 hourly foremen (all-white) and the necessity of some lag time for demonstration of satisfactory performance as an hourly foreman." *Id.* at 958 (App. 84a).[12] Reviewing individual instances of failure to promote blacks, the court found that "[t]he evidence has not shown a single example of a black indicating an interest in a foreman's job being passed over in favor of a white with less qualifications." *Id.* at 958 n.50 (App. 102a). The court concluded that Pullman's use of subjective judgment in selecting supervisors was not discriminatory.

On appeal, the Fifth Circuit reversed many of the District Court's findings. *Swint* v. *Pullman-Standard* (*Swint II*), 539 F.2d 77 (5th Cir. 1976) (App. 104a). Without deciding whether plaintiffs had established a prima facie case on departmental assignments, the panel held that the trial court had unduly narrowed its inquiry, and directed it to consider on remand evidence of discrimination in mixed-race departments, the racial composition of the two IAM departments, whether past dis-

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11 The District Court's determination here was derived entirely from the absence of employees of the opposite race in those departments. In its 1977 ruling on remand, the court concluded that as to these departments, its previous determination had been incorrect. *See* note 15, *infra*.

12 The district judge found that any difference between the selection rate for black hourly foremen and the percentage of blacks in the work force was fully explained by the fact that a greater proportion of black employees were functionally illiterate or minimally literate, had declined opportunities to become hourly foremen, and, due to pre-Act segregation, needed some time to learn the range of skills necessary to perform supervisory duties. *Swint I*, 11 FEP Cas. at 957-58 (App. 83a-84a).

crimination in the departments covered by the Labor Department agreement was probative of a plant-wide discriminatory policy, and whether the special skills that the District Court found were required for assignment to two departments (Welding and Maintenance) were justified by "business necessity." *Id.* at 94-98 (App. 123a-128a).[13]

On the promotions issue, the Fifth Circuit apparently agreed with the trial court's general approach of determining whether the black selection rate for salaried foremen could be explained by reference to the racial composition of the source group—*i.e.*, hourly foremen. The court held, however, that two of the factors cited by the trial judge in explaining the relative shortfall in black hourly foremen—functional illiteracy and the time lag (due to pre-Act discrimination) in acquiring supervisory skills—could not be considered in the absence of a showing of business necessity. The Fifth Circuit did agree, however, that evidence of a disproportionate number of refusals of offers of promotion by black employees and "the recent dramatic improvement in black promotions to salaried supervisor . . . clearly indicative of the lack of discrimination in promotion" could be treated as "counterbalancing evidence" in rebuttal of the plaintiffs' statistical showing. *Id.* at 104 (App. 138a). Here, too, the Court of Appeals expressly declined to decide whether plaintiffs had made out a prima facie showing of discrimination. *Id.* at 104-05 (App. 138a).

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13 The District Court had found that because a high proportion of jobs in the Welding and Maintenance departments required special skills and "typically have been filled by 'off-the-street' employment of persons already possessing requisite qualifications," "[b]are statistics showing only the racial composition of the employees in those departments do not—absent a study of the qualifications of the applicants or at least a showing of examples in which qualified blacks were not assigned to such departments—evidence discriminatory assignments thereto." *Swint I*, 11 FEP Cas. at 950 (App. 70a). The Court of Appeals, however, was of the view that "[t]he question of absence of qualifications is relevant, but only *after* the determination that a pattern of discrimination has been shown; and then, the burden is on the defendant to show the absence of qualifications." *Swint II*, 539 F.2d at 89 (App. 113a) (emphasis in original).

C. Post-*Teamsters* Proceedings and 1980 Appeal

While the case was on remand in the trial court, this Court rendered its decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). Relying on *Teamsters*, the District Court upheld Pullman's seniority system as *bona fide* within the meaning of § 703(h) of Title VII. *Swint* v. *Pullman-Standard* (*Swint III*), 15 FEP Cas. (BNA) 144 (N.D. Ala. 1977) (App. 156a). The trial court then turned to the question of discrimination in initial assignments after December 27, 1966.[14] The trial judge concluded, in the most unequivocal terms, that the statistics on post-1966 assignments could

> "give rise to no inference that assignments were being made to further a policy of segregated or racially-imbalanced departments. Indeed, if anything the reverse is true: the post-1966 assignments indicate that the company was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white and predominantly-white ones." *Swint III*, 15 FEP Cas. at 148 (App. 160a).

The court also addressed the pointed inquiries of the *Swint II* panel, and found that segregation had been totally abandoned after 1965 and "with the demise of the segregated job practice, so also went the ancillary practice of making departmental assignments based on race." *Id.* at 149 (App. 162a). The court concluded that the plaintiffs "have therefore failed to establish an essential element of their claim." *Id.*[15]

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14 This date was considered the "earliest possible" anterior date on the basis of a March 27, 1967 EEOC Commissioner's charge, even though the court had substantial reservations about using a Commissioner's charge to date liability when the instant private lawsuit grew out of later filed individual charges. *Swint III*, 15 FEP Cas. at 146 n.5 (App. 173a-174a). The date was later changed to September 28, 1966 in *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549, 1567 (11th Cir. 1988) (App. 28a).

15 Acknowledging that this finding was inconsistent with its determination in *Swint I* concerning the six single-race departments, the District Court

Turning to the supervisor promotions question, the District Court held that whatever prima facie showing plaintiffs had made "has been rebutted and that Pullman did not discriminate against blacks in such promotions in the time frame covered by the EEOC charges." *Id.* at 151 (App. 166a). The court explained that gross comparisons of the percentage of black supervisors with the percentage of blacks in the labor market or with the percentage of blacks in the work force were inappropriate. Rather, "[i]t is clear from the evidence, if not from common sense, that special skills are needed by supervisors and that . . . all workers are not 'fungible' when it comes to selection of supervisors." *Id.* at 150 (App. 165a). Relying on *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), the District Court determined that the appropriate source group for salaried foremen was the ranks of hourly foremen, and when a comparison is made between these two groups, "it is found that the number of blacks appointed to salaried supervisory positions is less than two standard deviations from the number expected from the composition of temporary foremen for the period." *Swint III*, 15 FEP Cas. at 151 (App. 166a).

The District Court proceeded to examine whether there had been post-1966 discrimination in the selection of hourly foremen. The trial judge found that "[p]romotions of temporary foremen are departmental in all aspects,"[16] and that [t]he

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determined that "its original decision, based largely upon a mechanical application of statistical data respecting a few departments, was incorrect," since "there was not a policy of discriminatory assignments respecting these six departments after 1966 anymore than there was respecting the other departments." *Swint III*, 15 FEP Cas. at 149 (App. 162a). As for the two IAM departments, the trial court concluded that "with respect to these departments, as with the other twenty-six departments, there was no policy or practice of discriminatory assignments after December 1966." *Id.* at 150 (App. 163a).

16 The trial judge explicitly found that "[o]f the 415 monthly promotions reported from January 1969 through May 1974, 403—or 97%—were

restriction of such temporary promotions to persons working in the department is a bona fide occupational qualification, justified by business necessity, under the evidence in this case." *Id.* at 151 (App. 167a). Here, any short-fall in the number of black hourly foremen[17] was due to the disproportionately higher rate of black refusals of hourly foreman promotions. *Id.* at 152 (App. 170a).

On appeal,[18] the Court of Appeals once again reversed. *Swint* v. *Pullman-Standard* (*Swint VI*), 624 F.2d 525 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982) (App. 207a). While this Court subsequently overturned the Fifth Circuit's reliance on its "ultimate fact" doctrine with respect to the seniority system issue, *de novo* appellate factfinding pervades all of *Swint VI*. Thus, with respect to initial assignments, the Court of Appeals was of the view that the trial judge had made some erroneous calculations with respect to the two IAM departments. It then summarily concluded that all of the District Court's findings were "factually unsubstantiated" and that although "the company made significant advancements in the elimination of previous all-black and all-white departments subsequent to 1966, the total employment picture indicates that departmental assignments

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appointments of a person then in the department. Of the 13 'inter-departmental' temporary promotions, virtually all involved an assignment to closely related work, *e.g.*, an Inspector to the department in which he performed his duties or an Assembler from one department being assigned as foreman for assembly work in another department." *Swint III*, 15 FEP Cas. at 151 n.18 (App. 176a). For promotions in two departments, however, the court found "that only Welders would be qualified to act as temporary foremen in the Welding Department and only persons with experience as a Riveter, Assembler or Heater would be qualified to act as temporary foremen in the Steel Erection Department." *Id.* at 152 (App. 169a).

17 The court found that 149 black hourly foremen were appointed from 1967 through May 1974, as contrasted with an expected figure of 175. *Swint III*, 15 FEP Cas. at 151 (App. 168a).

18 After *Swint III* issued, the District Court granted plaintiffs' motion for a third trial to put in evidence on the seniority system in light of *Teamsters*. *Swint* v. *Pullman-Standard* (*Swint IV*), 15 FEP Cas. (BNA) 1638 (N.D. Ala. 1977) (App. 178a). The court thereafter issued an opinion reaffirming its *Swint III* ruling. *Swint* v. *Pullman-Standard* (*Swint V*), 15 FEP Cas. (BNA) 730 (N.D. Ala. 1978) (App. 182a).

continued to be infected with racial considerations, albeit to a lesser degree than during the pre-Act period." *Id.* at 529 (App. 214a).

On the promotions issue, the Court of Appeals characterized the District Court's discussion of the importance of departmental experience to the selection of hourly supervisors[19] as a "limitation" on black promotional opportunities that had to be justified by business necessity. The Court of Appeals then disagreed with the District Court that Pullman's business needs were "sufficiently compelling," and further dismissed the evidence of a disproportionate rate of black refusal of promotions as "undeniably emanat[ing] from the very discrimination which the class members seek to eliminate." *Id.* at 536 (App. 226a-227a).[20]

D. This Court's Ruling

In *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273 (1982) (App. 231a), this Court held that the Court of Appeals in

19 Without squarely rejecting the District Court's precise findings on this point as "clearly erroneous," the Court of Appeals obliquely observed that "a substantial number of salaried and temporary foremen supervise departments in which they have never worked." *Swint VI*, 624 F.2d at 535 (App. 226a). This observation, unaccompanied by record citation, reveals the pitfalls inherent in *Swint VI*'s *de novo* reappraisal of the evidence. For example, the Court of Appeals did not explain whether the foremen in question had acquired relevant experience from work in related departments, a factor the District Court rightly considered highly material (see note 16, *supra*). Moreover, the Fifth Circuit's observation did not join issue with the District Court's opinion: the trial court's findings were that departmental experience was required for promotion to hourly foreman positions and that successful performance as an hourly foreman made one eligible for a salaried position, typically (but not necessarily) in the same department. As we develop in our third point, the then Fifth Circuit's proper course under Fed. R. Civ. P. Rule 52(a) if it suspected some factual error—and surely the Eleventh Circuit's unmistakable obligation after this Court's *Swint* ruling—was to remand to the District Court rather than to substitute its own findings.

20 The Court of Appeals in *Swint VI* here flatly contradicted its earlier approval, in *Swint II*, 539 F.2d at 104 (App. 137a), of consideration of the higher rate of refusal among black employees of foreman promotions.

Swint VI had exceeded the proper scope of review in its treatment of the trial court's findings on the validity of the seniority system. The Fifth Circuit was held to have proceeded in an "incredible" manner, explicable only in terms of that Circuit's position that "its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also . . . permit[s] it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law." *Id.* at 293 (App. 248a). Whether "ultimate" facts or not, this Court insisted, all factual issues are subject to Rule 52(a)'s clearly erroneous standard; the Court of Appeals' proper role is limited to identifying legal error and "remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Id.*

E. Proceedings on Remand from the Supreme Court

On remand, the Fifth Circuit returned the case to the trial court for further findings on the "locking-in" effect of the seniority system; it did not, however, reconsider its determination as to the initial assignments and promotions issues. *Swint* v. *Pullman-Standard* (*Swint VIII*), 692 F.2d 1031 (5th Cir. 1982) (App. 259a). Confined by this "limited remand,"[21] the District Court held that *Swint VI* was "law of the case" and that it was bound to find Pullman liable on those issues.

On cross-appeals, the Eleventh Circuit (which inherited this litigation) reached several conclusions warranting this Court's review. *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549 (11th Cir. 1988) (App. 1a). First, in complete disregard of this Court's intervening decision in *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), the Court of Appeals reaffirmed *Swint VI*'s finding of liability on the promotions issue. Plaintiffs were held to have made out a prima facie case under the

21 Although *Swint VIII* contains language suggesting a broader remand, the ruling of the Eleventh Circuit below makes clear that "the case was returned to the district court under a limited remand," 854 F.2d at 1578 (App. 50a), and that this Court's *Swint* ruling "did not *change* the law" and was limited to the seniority system issue, *id.* at 1582 (App. 57a) (emphasis in original).

disparate impact theory despite the absence of any showing of disparity with respect to the promotion-eligible group, on the premise that all of Pullman's black employees were "theoretically eligible for positions at least as temporary supervisors. . . ." *Swint XI*, 854 F.2d at 1581 (App. 55a). The burden of persuasion was therefore placed on Pullman to demonstrate the business necessity of its supervisory requirements. In the Eleventh Circuit's view, this Court's *Swint* ruling contained "no suggestion" that *Swint VI*'s liability finding on promotions was infirm, and hence required no reconsideration of that determination. Rather, *Swint VI* was viewed as holding that neither prior experience in the particular or related department nor the greater incidence of refusals by black employees to become hourly foremen could be relied upon because of Pullman's past initial assignment discrimination. *Id.* at 1582 (App. 57a).

Second, the court ruled that Swint and Johnson were appropriate class representatives even though they were both hired *before* the effective date of Title VII and hence had no personal stake with respect to the post-Act initial assignments claim. The court reasoned that since plaintiffs were challenging a "general policy of discrimination," they were adequate representatives within an exception to this Court's holding in *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). *Swint XI*, 854 F.2d at 1564, 1572-73 (App. 24a, 38a-40a).[22] Third, the court held that the initial assignments issue was properly treated as an independent claim, *id.* at 1571 (App. 36a-37a), without explaining why this Court's *Swint* opinion did not require reconsideration of that question as well.

22 The court acknowledged that "Pullman's argument that it had no basis on which to raise a standing claim earlier in the proceeding is persuasive. *Falcon* was new law; in fact, the decision reversed a ruling from this circuit." *Swint XI*, 854 F.2d at 1572 (App. 38a).

REASONS FOR GRANTING THE WRIT

I. This Case Raises Significant Questions as to the Appropriate Framework, after *Watson* v. *Fort Worth Bank & Trust*, for Disparate Impact Challenges to Subjective, Multicriteria Selection Systems for Supervisory Personnel.

Responding to the need to provide some method of challenging subjective selection systems which may be used as a covert means for accomplishing intentional discrimination, this Court in *Watson* v. *Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), upheld the use of the disparate impact theory to challenge such systems. Justice O'Connor's plurality opinion recognizes, however, the peculiar dangers of this theory when it is applied not to scored tests and other proxies for individualized consideration initially envisioned in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), but to subjective, multicriteria selection systems. So applied, it has the potential to subject every facet of an employer's decision-making process to burdensome, difficult-to-achieve validation requirements, thus creating virtually irresistible pressure to engage in quota practices in order to avoid those requirements. Such a result, the *Watson* plurality cautioned, would be contrary to at least the spirit, if not the letter, of Congress' judgment in Section 703(j) of Title VII, 42 U.S.C § 2000e-2(j), that this statute does not compel racially-balanced hiring and promotions.

As the Court of Appeals applied the *Griggs* approach to Pullman's promotion practices—and as it rejected out-of-hand the District Court's careful attempt to identify the appropriate group of promotion-eligible black workers and to take into consideration Pullman's aggressive post-Act measures to place its black workers on an equal footing—the message to employers to hire and promote on a quota basis is unmistakably clear. The Court has heard argument this Term in *Atonio* v. *Wards Cove Packing Co.*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-1387), to consider post-*Watson* issues with respect to the hiring of entry-level workers. This case presents an opportunity for establishing the appropriate ground-rules for the very different context of promotion of supervisory personnel.

A. The Eleventh Circuit's Refusal to Require Plaintiffs to Demonstrate Disparate Impact with Respect to the Group of Promotion-Eligible Blacks Conflicts with Several Decisions of this Court and Presents a Division Among the Circuits.

The Eleventh Circuit held that plaintiffs were not required to demonstrate disparate impact with respect to the promotion-eligible group. Although acknowledging the need in theory to establish some level of a "relevance threshold" concerning eligibility, the Court of Appeals deemed that threshold met here simply by comparing "the percentage of blacks in the Pullman workforce, all of whom were theoretically eligible for positions at least as temporary supervisors, with the percentage of blacks who were actually selected." *Swint XI*, 854 F.2d at 1581 (App. 55). The court thus swept aside the District Court's contrary factual finding that all Pullman workers, black or white, were *not* "theoretically eligible" for all temporary foreman positions, but rather that experience in the particular or related department was normally required. *See Swint III*, 15 FEP Cas. at 151 & n.18 (App. 167a, 176a). Moreover, the Eleventh Circuit blanketly rejected Pullman's stated promotional criteria for salaried foreman positions, which included knowledge of particular departments and successful experience as a temporary foreman, as either "impossible to incorporate into statistical proof or . . . themselves the result of discrimination." *Swint XI*, 854 F.2d at 1581 (App. 56a).

In effect, then, the Eleventh Circuit permitted plaintiffs to put Pullman to the burden of proving business necessity through a gross, "bottom line" comparison of the percentage of black workers to the percentage of black supervisors—a comparison which wholly fails to take into account minimal threshold qualifications. This approach, longstanding with the Eleventh Circuit,[23] reflects a form of "bottom line" reasoning

23 In *Powers* v. *Alabama Department of Education*, 854 F.2d 1285 (11th Cir. 1988), the Eleventh Circuit insisted that *Watson* required no change in its well-established position, reflected in *Swint XI* as well as *Griffin*

repudiated in *Connecticut* v. *Teal*, 457 U.S. 440 (1982). Moreover, it contradicts the *Watson* plurality's insistence that plaintiffs are "responsible for isolating and identifying the specific employment practices" causing the alleged adverse impact, and for demonstrating that those practices in fact "caused" the minority group exclusion. *See Watson*, 108 S.Ct. 2788-89.

This Court has made clear that statistical analysis of discrimination must reflect an assessment of the eligible applicant or employee pool. Thus, in *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977), a disparate treatment case, this Court cautioned that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Even in the context of voluntary affirmative action programs, the type of "imbalance" that may legitimately provide a basis for such preferences requires a comparison of those actually hired or promoted with "those in the labor force who possess the relevant qualifications." *Johnson* v. *Transportation Agency*, 480 U.S. 616, 632 & 633 n.10 (1987) (defining the Title VII prima facie case). This principle was most recently reaffirmed in *City of Richmond* v. *V.A. Croson Co.*, 109 S. Ct. 706, 725 (1989): "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[24]

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v. *Carlin*, 755 F.2d 1516 (11th Cir. 1985). In the Court of Appeals' view, "plaintiffs alleging class-wide discrimination in promotions are not required to isolate the particular aspect of the promotional process that is responsible for the discriminatory impact," and a prima facie case may be established without accounting for the absence of relevant experience in a supervisory line of progression. *See Powers*, 854 F.2d at 1293-94.

24 It offers little comfort to suggest, as the Court of Appeals did, that plaintiffs should be free to mount *Griggs* suits without regard to "employer-specific qualifications" because such qualifications "should be subjected to the light of day and evaluated to see if they are truly necessary to the employ-

The holding of the Eleventh Circuit below squarely conflicts with the position of the Ninth Circuit and, in all probability, the Seventh Circuit as well. Applying *Hazelwood*, the Ninth Circuit would insist on a qualified labor pool comparison in the case of a disparate impact challenge to the promotion policies of an employer, like Pullman, who promotes from within. Thus, in *Moore* v. *Hughes Helicopters, Inc.*, 708 F.2d 475, 484 (9th Cir. 1983), the court held that in "promotion cases, it will be necessary for the plaintiff to show that the pool of eligible employees is qualified for promotion to a position for which it is manifest that special skills are required." *Moore* specifically applied this principle to first-line supervisory positions: As "the identification of a job position as 'supervisor' implies at least a modicum of job-related experience," it was plaintiff's responsibility "to identify a pool of employees eligible for supervisory positions who possessed the requisite experience." *Id.* at 485.[25]

More recently, the Seventh Circuit has recognized, in *Cox* v. *City of Chicago*, Nos. 88-2598, 88-2599 (7th Cir. Jan. 27, 1989), that *Watson*'s identification and causation requirements preclude plaintiffs from establishing a prima facie impact case through "underrepresentation statistics," even when challeng-

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er's business." *Swint XI*, 854 F.2d at 1582 n.50 (App. 56a). Statistics based on an employee population "containing individuals lacking minimal qualifications for the job" are simply of "little probative value," *Watson*, 108 S. Ct. at 2790 (plurality opinion), and hence are not sufficient to impose burdensome validation requirements on employers. In any event, the District Court expressly found that the departmental experience requirement for hourly foremen was "justified by business necessity." *Swint III*, 15 FEP Cas. at 151 (App. 167a).

25 Several pre-*Watson* rulings are consistent with the Eleventh Circuit. *See, e.g., Shidaker* v. *Tisch*, 833 F.2d 627 (7th Cir. 1986), *cert. denied*, 108 S. Ct. 2900 (1988); *Segar* v. *Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). However, unlike the Court of Appeals below, both the Seventh Circuit in *Shidaker* and the D.C. Circuit in *Segar* would at least permit a defendant to defeat a prima facie case by showing that plaintiff's statistical disparity did not account for relevant experience. *See Shidaker*, 833 F.2d at 633; *Segar*, 738 F.2d at 1276-77. In addition, *Shidaker* relies on an "underrepresentation statistics" approach that may no longer reflect the Seventh Circuit's view. *See Cox* v. *City of Chicago*, Nos. 88-2598, 88-2599, slip op. at 10 (7th Cir. Jan. 27, 1989) (questioning *Shidaker* and *Griffin* v. *Carlin*, *supra*).

ing subjective promotion systems. As the Seventh Circuit now acknowledges, plaintiffs must prove adverse impact through "eligibility rate statistics" that focus on the pool of blacks qualified for the higher-level position: "Eligibility rate statistics, not underrepresentation statistics, encompass this causation requirement." *Cox*, slip op. at 11. By contrast, the Eleventh Circuit's view is that *Watson* requires no change at all in what is in essence its longstanding underrepresentation-statistics approach. *See Powers v. Alabama Department of Education*, 854 F.2d 1285, 1293-94 (11th Cir. 1988); note 23, *supra*.

This Court should grant certiorari both to resolve this conflict and to clarify the plaintiff's burdens in a disparate impact challenge to subjective multicriteria selection systems for supervisory personnel.

B. The Court of Appeals' Allocation of the Burden of Persuasion to the Employer to Prove the Necessity of its Business Requirements for Supervisor Promotions was Improper Under *Watson*.

The rationale for allowing a disparate impact challenge to subjective systems is that it serves as a useful adjunct to an intentional discrimination case—to capture situations where "the problem of subconscious stereotypes and prejudices would remain." *Watson*, 108 S. Ct. at 2786. The *Watson* plurality urged, however, that the "business necessity" or "job-relatedness" doctrine, as applied to subjective systems, should not be interpreted as shifting the ultimate burden of proof to the defendant:

> "On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate reasons, the plaintiff must 'show that other tests or selection devices, without a similar undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.' Factors such as the cost or

other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson*, 108 S. Ct. at 2790 (citation omitted).

In this case, the Court of Appeals misconceived the proper allocation of burdens in a *Watson*-type challenge. The court held that "[t]he burden—not just of production but of persuasion—was then on Pullman to show that the practice challenged arose from a non-discriminatory business necessity," and that "Pullman had offered no legally acceptable evidence that its subjective selection procedure was a business necessity." *Swint XI*, 854 F.2d at 1580 (App. 53a). Even on the assumption *arguendo* that a prima facie case had been established, the burden-allocation below was improper on two counts. First, Pullman's burden should have been one of production only, of producing evidence of legitimate business reasons bearing "'a manifest relationship to the employment in question'"—similar to that which sufficed in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979); *see Watson*, 108 S. Ct. at 2790-91 (plurality opinion).[26] The District Court's findings in *Swint III* make clear that Pullman successfully carried such a burden, thus removing any basis for a reasonable inference that its departmental experience requirement for hourly foremen or its use of subjective criteria was a pretext for intentional discrimination. Second, the appeals court erred in relieving plaintiffs of their ultimate burden to show reasonable alternative selection criteria,[27] for in the absence of such proof the inference of pretextual discrimination—which is the

26 In *Powers*, *supra*, the Eleventh Circuit held despite *Watson* that the burden of persuasion remains with the defendant. *See* 854 F.2d at 1292 n. 11.

27 The Court of Appeals clearly placed this burden on Pullman, requiring that its supervisory requirements "must 'not only foster safety and efficiency, but must be essential to that goal . . . and there must not be an acceptable alternative that will accomplish that goal equally well with a lesser differential racial impact.' " *Swint VI*, 624 F.2d at 536 (App. 226a), *quoting Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979).

principal focus of a *Watson*-type challenge—cannot be sustained.[28]

C. The Court of Appeals Improperly Commingled Disparate Treatment and Disparate Impact Theories.

Since Title VII plaintiffs may be expected, after *Watson*, to utilize both disparate treatment and disparate impact theories in the same challenge to a subjective system, this Court should grant review to clarify the extent to which findings in the treatment phase of a case can be used to impeach or undermine the employer's rebuttal case in the impact phase. A recurring theme of both the Eleventh Circuit opinion, and the *Swint VI* ruling it reaffirms, is that Pullman could not properly rely on a departmental experience requirement or evidence of a disproportionate refusal of black workers to accept hourly foreman positions because it had been found to have engaged in discriminatory initial assignments. *See Swint XI*, 854 F.2d at 1582-83 (App. 57a–58a); *Swint VI*, 624 F.2d at 536 (App. 227a).

In so ruling, the Court of Appeals impermissibly blurred the critical distinction between treatment and impact theories, disregarding the central limitations of each theory. Liability for disparate treatment requires a finding of discriminatory motivation. This was found (by the Court of Appeals) to exist for a particular period (October 1965-January 1969) and only with respect to one aspect of the employer's operations (departmental assignment of new hires). That finding was then used by the court to nullify, as a practical matter, the employer's ability to maintain an otherwise legitimate supervisor selection system, but without any proof of intentional discrimination affecting such selections. In the absence of a finding of plant-wide intentional discrimination infecting all of Pullman's selection processes—a finding never made in this case and one which could not be made on this record—the Eleventh Circuit effected the functional equivalent of such a finding by disallowing Pull-

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28 Indeed, the District Court found that "[t]he only suggested alternative in the evidence, that by one of plaintiffs' witnesses, was that [plant-wide] seniority should be followed in making appointments of foremen. An objective standard to be sure, but hardly an apt one." *Swint I*, 11 FEP Cas. at 958 n.54 (App. 102a).

man's business-necessity rebuttal case. As this part of the case was predicated on an impact rather than intentional bias theory, Pullman was entitled to a fair hearing on the business justification for its supervisory requirements.

II. The Eleventh Circuit's Holding that Individuals Hired Outside the Liability Period and Who Never Asserted Individual Claims of Discriminatory Denial of a Supervisor Promotion Are Proper Class Representatives to Assert Initial Assignment and Promotions Claims Conflicts with the Decisions of This Court and Other Courts of Appeals.

The Eleventh Circuit held that respondents Swint and Johnson were proper representatives to assert class claims regarding initial assignments and supervisor promotions even though, at the outset of the suit as well as at the time of certification, they had not the slightest personal stake in either claim.[29] Acknowledging that *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), had rejected the Fifth Circuit's previous "across-the-board" approach to Title VII class actions, the Court of Appeals reasoned that this case came within the "general policy of discrimination" exception identified in footnote 15 of *Falcon*. *See Swint XI*, 854 F.2d at 1573 (App. 40a). The Court of Appeals' sweepingly broad interpretation of *Falcon* effectively permits the exception to swallow the rule, placing in the hands of any artful pleader the means to accomplish "across-the-board" certification in virtually every Title VII case. Moreover, the ruling below directly conflicts with decisions of other circuits and disregards Article III limitations on class representative standing. This case thus presents a well-defined conflict requiring this Court's resolution, as well as the opportunity to clarify the reach of *Falcon* and to reaffirm the standing requirements imposed by Article III.

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29 Both named plaintiffs were hired and initially assigned well before the effective date of Title VII and commencement of the liability period. Moreover, neither could have been injured by Pullman's promotion practices; indeed, Swint was a vocal, militant opponent of black employees who agreed to serve as supervisors, and Johnson had himself rejected an offer of promotion. (*See* notes 7 & 8, *supra*).

A. This Court Should Grant Review to Clarify the Proper Reach of *Falcon*, an Issue of Recurring Importance in the Administration of Title VII, and to Resolve the Division Among the Circuits.

The central teaching of both *Falcon*, and its predecessor *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), is clear: careful attention to the typicality and commonality requirements of Rule 23 "remains indispensable" even in Title VII suits. *Falcon*, 457 U.S. at 157; *Rodriguez*, 431 U.S. at 405. *Falcon* expressly rejected the "across-the-board" doctrine as undermining Rule 23's insistence on an essential identity of interest between the class and its representatives. *Falcon*, 457 U.S. at 157-59. Thus, this Court demands that a class representative "be part of the class and 'possess the same interest and suffer the same injury' as the class members," *Rodriguez*, 431 U.S. at 403, *quoting Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974); and that the class claims be limited "to those fairly encompassed by the named plaintiff's claims," *Falcon*, 457 U.S. at 156, *citing General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980).

Here, the Eleventh Circuit has resurrected precisely what *Rodriguez* and *Falcon* sought to put to rest. The named plaintiffs were held to be proper Rule 23 representatives because "[f]rom the start, the plaintiffs' basic complaint has been that Pullman prevented black employees from moving into its higher-level positions." *Swint XI*, 854 F.2d at 1573 (App. 39a). Characterizing the injuries suffered by the named plaintiffs and the class as "[t]he same injury"—that is, "being locked into . . . lower-paying jobs"—the Eleventh Circuit determined that the only real question was through which employment practice this result ultimately came about—"whether it was the discrimination in assignments or the nature of the seniority system, or both, that prevented blacks from moving up the job ladder." *Id.* (App. 40a) Yet, the Court of Appeals failed to require, as mandated by *Rodriguez* and *Falcon*, that at least one of the two named plaintiffs be injured by each—not to say *any*—of these practices.

The Eleventh Circuit attempted to fit the facts of this case into one of two exceptional situations recognized in footnote 15

of *Falcon*. Specifically, the court invoked the so-called second exception as authority for its conclusion that Pullman "operated under a general policy of discrimination" that manifested itself in the challenged practices "in the same general fashion." *See Falcon*, 457 U.S. at 159 n.15. In this case, however, there was neither a single employment practice nor a subjective decision-making process identified as common to both assignments and supervisor promotions. Although the named plaintiffs may have been able to claim injury from the seniority system insofar as it allegedly perpetuated pre-Act discrimination, they "could have suffered no injury as a result of" post-Act discrimination in departmental assignments of new hires, "and they [are] therefore, simply not eligible to represent a class of persons who did allegedly suffer [such] injury." *Rodriguez*, 431 U.S. at 403-404. The same applies to their claimed status as class representatives on the supervisor promotions issue. To hold, as the Court of Appeals did, that a policy of such amorphous scope as keeping blacks "locked into . . . lower-paying jobs" or preventing them "from moving up the job ladder" satisfies the "general policy" exception is to accord footnote 15 an unwarranted breadth that threatens to swallow the very rule announced in the body of the *Falcon* opinion.

The reservation in footnote 15 has generated inconsistent applications of *Falcon* in the various circuits, leading some courts to believe that the *Falcon* holding, as qualified by footnote 15, does not completely foreclose across-the-board actions.[30] Other courts have construed *Falcon* more strictly, undertaking exacting reviews of class certification and rejecting expansive applications of footnote 15 that would essentially revive "across-the-board" attacks.[31]

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30 *See, e.g., Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (standing affirmed where named plaintiff "attempted to prove that [the employer] had denied women opportunities to advance themselves, either as she sought to do, by transfer, or as other class members sought, by training or promotion," through various employment practices including the use of a subjective evaluation system).

31 *See, e.g., Wagner* v. *Taylor*, 836 F.2d 578, 593 (D.C. Cir. 1987) (employee denied promotion could not represent a class consisting of disap-

Moreover, the ruling below directly conflicts with decisions of the Third and District of Columbia Circuits over whether employees, like named plaintiffs here, hired outside the liability period are proper class representatives to challenge discrimination in initial assignments occurring during the liability period. *See Goodman* v. *Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985), *aff'd on other grounds*, 482 U.S. 656 (1987) ("All of the named plaintiffs, however, were originally hired outside the limitations period, and therefore, none have a viable complaint about discrimination in initial assignment. Thus, no representative adequately represents the class on this particular claim."); *Berger* v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1409-10 (D.C. Cir. 1988), *pet. for cert. filed*, 57 U.S.L.W. 3334 (U.S. Nov. 8, 1988) (No. 88-699) (named plaintiffs could not represent class challenge to high school diploma requirement of apprenticeship program because they "were too old to challenge the . . . requirement within the statutory limitations periods, or were not injured by it because they had no interest in enrolling in the [program] during those periods").[32]

The class representative holding below also conflicts with the Eighth Circuit over whether employees, like named plaintiffs here, who never alleged individual claims of discriminatory denial of a supervisory position may represent a class challenge to allegedly discriminatory promotion practices. *See Roby* v. *St. Louis Southwestern Ry.*, 775 F.2d 959, 962 (8th Cir. 1985) ("[b]ecause [named plaintiffs] were not affected by the Rail-

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pointed applicants and of employees who were fired, denied promotions, or discriminated against in the terms and conditions of employment); *Holsey* v. *Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) (same application procedure and entirely subjective criteria applicable to both employees and outside applicants for same jobs does not constitute significant proof warranting single class treatment within meaning of footnote 15); *Lilly* v. *Harris-Teeter Supermarket*, 720 F.2d 326, 333-34 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) (named plaintiff's claim, although overlapping on several important pieces of proof with class claims, nonetheless failed to justify single class treatment for more than one employment practice as provided in footnote 15).

32 *See also International Woodworkers* v. *Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1270 (4th Cir. 1981) (pre-*Falcon* decision consistent with Eleventh Circuit below).

road's promotion policies, they were not proper class representatives for those employees who are affected by these policies.").

This Court is thus presented with a conflict in the circuits over whether a named plaintiff may represent a class claim of discriminatory initial assignments when that plaintiff's initial assignment occurred outside the liability period, or a class claim of discriminatory denials of promotion even though that plaintiff lacked an individual promotion claim. Inasmuch as these are issues that arise frequently in Title VII cases, this Court should grant certiorari in order to resolve the conflict and clarify the scope of the purported "general policy of discrimination" exception reserved in footnote 15 of *Falcon*.

B. The Eleventh Circuit's Holding that the Named Plaintiffs are Adequate Class Representatives Violates Article III Limitations on Class Action Standing.

A private Title VII suit brought on behalf of a class depends not only on the satisfaction of Rule 23 but also upon a representative plaintiff who has constitutional standing to raise the class claims. To meet the threshold requirement imposed by Article III, a named plaintiff must satisfy two prerequisites. First, he " 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' " *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974), *quoting Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). Second, a named plaintiff must have suffered an injury in the same manner as have the members of the class he seeks to represent. *See O'Shea*, 414 U.S. at 495; *Sosna* v. *Iowa*, 419 U.S. 393, 402-03 (1975). Indeed, this Court has repeatedly cautioned:

> "It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. *Nor does a plaintiff who has been subject to injurious conduct of one kind possess* by virtue of that injury *the necessary stake in litigating conduct of another kind, although similar*, to which he has not been subject."

Blum v. *Yaretsky*, 457 U.S. 991, 999 (1982) (emphasis supplied); *see Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-167 (1972).

The Court of Appeals below has departed inexplicably from the longstanding requirements of Article III and the decisions of this Court in neglecting to address whether the named plaintiffs had constitutional standing to adjudicate each of the claims they now seek to raise on behalf of the class.[33] The named plaintiffs never had a constitutionally cognizable initial assignments claim. Furthermore, insofar as they were never injured individually by the denial of a promotion, they do not now and never did have constitutional standing to assert a challenge to Pullman's promotion practices and hence lacked standing to litigate that claim on behalf of a class.

The Eleventh Circuit's summary disregard of the Article III dimension of plaintiffs' class representative status presents a conflict with rulings of this Court and the Fifth Circuit, *see e.g.*, *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); *Vuyanich* v. *Republic National Bank*, 723 F.2d 1195, 1200 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984),[34] warranting a grant of certiorari.

III. The Eleventh Circuit's Refusal to Reconsider its 1980 *De Novo* Factfinding in Light of this Court's *Swint* Opinion Warrants Review as an Exercise of Supervisory Authority.

The Eleventh Circuit took the view that this Court's opinion in "*Swint VII* did not *change* the law"—that it had not engaged in improper factfinding except as to the seniority system. *Swint XI*, 854 F.2d at 1582 (App. 57a) (emphasis in original). There is, however, no way to make sense of much of the Fifth Circuit's 1980 ruling as to issues other than the seniority system as

33 Although a Rule 23 case, *Falcon* implicitly recognizes the mandate of Article III underlying the requirements of Rule 23. "The mere fact," the Court stated, "that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Falcon*, 457 U.S. at 159 n.15.

34 *Swint XI* also conflicts in this regard with an earlier Eleventh Circuit ruling in *Griffin* v. *Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1729 (1988).

anything but *de novo* appellate factfinding. Although sanctioned at the time under the Fifth Circuit's "ultimate fact" doctrine, that judicial approach is squarely at odds with this Court's *Swint* opinion.

Thus, for example, on the initial assignments issue, there had been no prior finding by either the District Court or the Court of Appeals that a prima facie "pattern or practice" case of intentional discrimination had been made out. Yet, in *Swint VI*, after finding some errors in the trial judge's calculations with respect to the two IAM departments, the Court of Appeals baldly announced that it had "carefully reviewed the post-Act assignment statistics" and that "they clearly" support the plaintiffs' contention on the existence of a discriminatory post-Act initial assignments policy. *Swint VI*, 624 F.2d at 529-30 (App. 214a). But here, as on the seniority issue, "the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination," *Swint VII*, 456 U.S. at 287 (App. 243a). Moreover, even if, for the sake of argument, the District Court had made an error of law or the appeals court had some doubts about the trial court's statistical analysis, this Court's *Swint* ruling teaches that a remand for new factfinding was the only proper course consistent with Rule 52(a). The existence of discriminatory intent with respect to the post-Act initial assignments,

> "whether an ultimate fact or not . . . is a factual matter subject to the clearly-erroneous standard of Rule 52(a). It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Id.* at 293 (App. 248a).

On the promotion issue, the Eleventh Circuit attempted to characterize its earlier ruling as based on the District Court's misapplication of the legal standard. Even if true, this called, at most, for a remand as opposed to appellate factfinding. But such a characterization of *Swint VI* does not, in any event, withstand analysis. The District Court found that Pullman's

limitation of hourly foreman promotions to employees with experience in a particular or closely-related department was "justified by business necessity under the evidence in this case." *Swint III*, 15 FEP Cas. at 151 (App. 167a). The *Swint VI* court simply disagreed "that the business need advanced by the defendants for the limitation which restricts the promotion of blacks to supervisory positions is sufficiently compelling to override the significant racial impact." *Swint VI*, 624 F.2d at 535-36 (App. 226a).[35] This was appellate factfinding, pure and simple, which the Eleventh Circuit has chosen to reaffirm in the face of this Court's contrary instructions on the proper role of appellate review.

The Court is understandably reluctant to review opinions for compliance with Rule 52(a), but here the Eleventh Circuit's failure to conform to its strictures in the very case in which this Court insisted on such compliance warrants a grant of certiorari in the exercise of the Court's supervisory authority.

IV. The Holding Below that Alabama's Six-Year "Non-Residual" Statute Applies to § 1981 Claims Warrants Review in Light of *Owens* v. *Okure*.

The District Court held that Alabama's residual statute of limitations for personal injury actions[36] should apply to date

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35 The appeals court may also have been unduly influenced by its now rejected perpetuation-of-pre-Act-discrimination ruling on the seniority system issue, finding that "these variables relied upon by the district court do not weigh heavily enough to lessen the appellants' empirical conclusions that black employees were locked in the lower paying jobs and departments." *Swint VI*, 624 F.2d at 536 (App. 227a). Despite the Eleventh Circuit's effort at minimizing this language, 854 F.2d at 1583 (App. 59a), the so-called "locking-in effect" was clearly (and improperly) used to discredit Pullman's business-necessity rebuttal case.

36 *Swint* v. *Pullman-Standard* (*Swint X*), No. CV71-P-0955 S (N.D. Ala. Nov. 26, 1986) (App. 278a). That statute, currently codified at Section 6-2-38 of the Alabama Code, now provides for a two-year statute of limitations. However, prior to 1985, the statute, then codified as Section 6-2-39(a)(5) of the state code, provided for a one-year period.

recovery for plaintiffs' § 1981 claims.[37] The Court of Appeals reversed, opting for the six-year Alabama statute for actions alleging "trespass to person or liberty."[38] Subsequent to the Eleventh Circuit's pronouncement, however, this Court issued its decision in *Owens* v. *Okure*, 109 S. Ct. 573 (1989), holding that where state law provides more than one statute of limitations for personal injury actions, courts considering § 1983 claims should borrow the limitations period from that state's general or residual statute. Moreover, this Court specifically referred to the statute selected by the District Court below as the one applicable to § 1983 claims in Alabama. *Owens* v. *Okure*, 109 S. Ct. at 580 n.9. Insofar as the statute of limitations that applies to claims under § 1983 should apply equally to those brought under § 1981, *see Goodman* v. *Lukens Steel Corp.*, *supra*, 777 F.2d at 120, it is clear that the limitations period applicable to the instant case is not the one imposed by the Court of Appeals but the one-year provision contained in Alabama's residual statute.

37 This point assumes, for the sake of discussion, that § 1981 reaches private discrimination—an issue currently under reconsideration in this Court in *Patterson* v. *McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987).

38 *Swint XI*, 854 F.2d at 1567-70 (App. 29a-35a). Ala. Code § 6-2-34(1) (1977).

CONCLUSION

For all these reasons, Petitioner requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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88-1601

No. 88-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PULLMAN-STANDARD, INC., A SUBSIDIARY OF THE PULLMAN COMPANY,
Petitioner,

—v.—

LOUIS SWINT, and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I. Opinion Delivered upon the Rendering of the Judgment Sought to be Reviewed

SWINT XI

U.S. Court of Appeals
Eleventh Circuit

United States Court of Appeals,
Eleventh Circuit.

Nos. 84-7319, 86-7886 and 87-7057.

Sept. 21, 1988.

William B. LARKIN; Louise Seals, as personal representative of Spurgeon Seals, deceased; Lillie Lofton, as personal representative of Edward Lofton, deceased; Jesse B. Terry, on behalf of himself and others similarly situated, Plaintiffs-Appellants,

—v.—

PULLMAN-STANDARD DIVISION, PULLMAN, INC., a corporation, Defendant-Appellee

---

Louis SWINT and Willie James Johnson, on behalf of themselves and other similarly situated; Clyde Humphrey, Plaintiffs-Appellants,

—v.—

PULLMAN-STANDARD, Bessemer, Alabama; United Steelworkers of America Local 1466; and United Steelworkers of America, AFL-CIO, International Association of Machinists, Defendants-Appellees.

Louis SWINT, and Willie James Johnson, on behalf of themselves and others similarly situated; Clyde Humphrey, Plaintiffs-Appellees,

—v.—

PULLMAN-STANDARD, Bessemer, Alabama, Defendant-Appellant,

United Steelworkers of America Local 1466; and United Steelworkers of America, AFL-CIO, International Association of Machinists, Defendants.

O. William Adams, III, Birmingham, Ala., Elaine R. Jones, Washington, D.C., James U. Blacksher, Birmingham, Ala., Eric Schnapper, NAACP Legal Defense Fund, New York City, for plaintiffs-appellants in No. 84-7319.

C.V. Stelzenmuller, Burr & Forman, Birmingham, Ala., for defendant-appellee in No. 84-7319.

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Jerome A. Cooper, Cooper, Mitch & Crawford, Birmingham, Ala., for defendants-appellants in No. 86-7886.

C.V. Stelzenmuller, Burr & Forman, Birmingham, Ala., for defendant-appellant in No. 87-7057.

Appeals from the United States District Court for the Northern District of Alabama.

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge.

CLARK, Circuit Judge:

Few cases better represent the idea that the road to justice can be a long and tortured one. The class action giving rise to two of these three consolidated appeals was filed in 1971. The named plaintiffs, Louis Swint and Willie Johnson (the "*Swint* plaintiffs"), alleged that Pullman-Standard, Inc. (Pullman), the United Steelworkers, and United Steelworkers Local 1466 (col-

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

lectively USW) had engaged in a number of racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982),[1] and 42 U.S.C. § 1981 (1982).[2] Since the complaint was filed, many members of the plaintiff class have died, and our consideration of the case marks its fourth appearance before this court. Both sides have appealed certain aspects of the district court's decision.

A related suit, from which the remaining appeal arises, was filed in 1975. The plaintiffs in that suit—William Larkin, Spurgeon Seals, Edward Lofton, and Jesse Terry (the "*Larkin* plaintiffs")—brought similar charges against Pullman, and our consideration of their case marks its second appearance here. The *Larkin* plaintiffs appeal a separate district court's decision in favor of Pullman.

Regretting that we cannot resolve the case in its entirety, we affirm in part and reverse in part the *Swint* district court decision, and affirm the *Larkin* district court decision.

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1 Title VII provides that

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

2 Section 1981 provides that

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

I. *The Factual Background*

Both the *Swint* and *Larkin* lawsuits challenge employment practices at Pullman's Bessemer, Alabama plant before it closed in 1980. Employees at the plant during the general[3] time frame covered by the complaints were drawn from twenty-eight departments, each department covering roughly a particular phase of Pullman's manufacture of railroad cars. Pursuant to collective bargaining agreements with the two unions, two of the departments were represented by the International Association of Machinists (IAM); and the remaining twenty-six by USW.[4] The agreements were different, but they had one important provision in common: seniority, the primary factor upon which promotions were based, was not transferable between the various departments,[5] at least prior to 1972.[6] If an employee transferred to another department, he[7] lost his seniority.

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3 It is necessary to refer to the general time period because, as will become apparent later, the time period covered by the complaints is very much at issue.

4 Because IAM was not named in any of the EEOC charges or in Swint's complaint, the union is in the case as a defendant only to the extent that some of the relief sought by the plaintiffs might entail modification of its contract with Pullman. For this reason, any further references to "the union" will be to USW unless otherwise specifically noted.

5 USW's agreement provided that seniority meant continuous service in a single department. IAM's seniority system was even more restricted. Seniority meant continuous service in the same type of *job*, i.e., millwrights got credit only for the time they had been millwrights. Because the agreements differed with respect to what constituted seniority, we shall refer to Pullman's overall seniority system as "nontransferable" rather than "departmental."

6 Pullman entered into an agreement with the Department of Labor's Office of Federal Contract Compliance in 1972 that permitted certain blacks to transfer to certain other departments without losing their seniority. *See infra* part I.A.

7 There were twenty or so women working at the Bessemer plant in the late sixties-early seventies. However, because the workforce was predominantly male, and to prevent the reader's distraction, the masculine gender of pronouns will be used in this opinion.

A. Assignments and Promotions

There is little dispute that, prior to 1965, there were both segregated departments and mixed-race departments. Four USW departments—Die & Tool, Janitor, Steel Miscellaneous, and Truck—were all black. Five USW departments—Air Brake, Inspection, Plant Protection, Powerhouse, and Template—and the two IAM departments—Die & Tool and Maintenance—were all white.[8] There were also, within each mixed-race department, "white" jobs and "black" jobs, meaning that when a particular job was vacated, it was necessarily filled with an employee of the same race. The "white" jobs tended to be the higher-paying, and the "black" jobs the lower-paying. Within the USW departments, in addition to the racial division of job assignments, there were specific pay-skill levels, each represented by a job class (JC) number. The JC number reflected the highest level of skill at which an employee had demonstrated he could work, and it determined what the employee's base pay would be.

Both before and after 1965, when a person was hired, he was assigned to both a department and a particular job. The job assignment would set the employee's JC level. Under the collective bargaining agreement, promotions to higher JC-level jobs were to be awarded on the basis of seniority (which in effect meant they were intradepartmental only), provided that the employee could actually perform the work and that the position was not filled from the outside. The highest JC level an employee could achieve within his department varied with the department. In the all-black departments, the maximum JC level varied from 1–9; in the mixed-race departments, the maximum varied from 8–18; and in the all-white departments, the maximum varied from 8–20.[9] Vacancies were not announced or posted. Pullman supervisors would choose the employee to

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8 Although the two unions' reasons for doing so are disputed, it is not disputed that agreements between IAM and USW's predecessor, the Steel Workers Organizing Committee (SWOC), in the 1940's resulted in IAM trading its twenty-four black members for two of SWOC's white members.

9 These JC level figures refer exclusively to the USW departments.

fill the position or make the determination to hire from the outside.

In 1965, after an arbitration decision had opened up the previously all-white riveter job to blacks, some changes began to take place. The system of nontransferable seniority and promotions remained in place,[10] but a reporting system of hires and promotions was developed, and Pullman expressed its desire to recruit blacks for the highly-skilled positions. Unfortunately, at the same time, Pullman terminated its practice of offering on-the-job training and began to require that employees wanting to move to a higher skill level demonstrate they they had formal outside training or experience.

In January 1969, Pullman entered a conditional memorandum of understanding with the Department of Labor's Office of Federal Contract Compliance (OFCC) that it would encourage blacks to move from "low-ceiling" departments (where the highest JC level available was still quite low) to higher-ceiling ones. Pullman also agreed to offer at the company's expense, and encourage black employees to take part in, a program of outside vocational education. The memorandum, however, did not officially become effective because the union did not approve it. In May 1972, Pullman entered another agreement with OFCC that allowed blacks who were hired into the four traditionally black departments prior to April 30, 1965 to transfer into any department without losing their seniority. Additionally, any black whatsoever hired prior to April 30, 1965 was permitted to transfer to one of the five traditionally white departments without losing his seniority. The transfers, of course, were dependent on there being a vacancy in the department to which an employee wished to transfer. Seventeen blacks used this agreement to transfer, though it, like the 1969 memorandum, was not formally adopted by the unions.

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10 As will be discussed in more detail later, *see infra* part V, the parties dispute whether the practice of reserving certain intradepartmental jobs for whites and others fore blacks continued after 1965.

B. Selection of Supervisors

The selection of supervisors, both before and after 1965, was not based on seniority. There were four levels of supervisors: "hourly foremen," who alternated between regular and supervisory work; "A foremen," the lowest-level salaried employees; "B foremen"; and Department Heads. These positions were considered within Pullman's (rather than USW's) purview. The B foremen would select the hourly and A foremen, and the Department Head would select the B foremen. The selections were based on the relevant supervisor's subjective evaluations of the employees, which were in turn based on what Pullman calls "objective" criteria, such as the ability to get along with other employees and knowledge of the particular department's operations. Foremen were not necessarily drawn from the department they would ultimately supervise.

II. The Litigation

A. The EEOC Proceedings

After Title VII became effective in June of 1965, the Equal Employment Opportunity Commission (EEOC) received several charges complaining that Pullman had engaged in racially discriminatory employment practices. Five of these charges are relevant here. On November 4, 1966,[11] Spurgeon Seals, a *Larkin* plaintiff, filed a charge alleging that he had been passed over for a better paying job in spite of his seniority. On March 27, 1967, EEOC Commissioner Stephen Shulman filed a charge alleging that Pullman discriminated against blacks in its hiring and promotional practices. On April 11, 1967, Spurgeon Seals, Edward Lofton and Jesse Terry filed a document that they styled an "amendment" to Seals' 1966 charge. To Seals' spe-

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11 There is some confusion about this date. The copy of the charge that appears in the record indicates that it was signed October 30, 1966, but there is no indication of the filing date. Because documents filed by Pullman with the EEOC argue that the charge was filed on November 4, and, at least at one point, the plaintiffs' brief so indicates, we will assume that November 4 is the actual filing date. In any event, our disposition of this charge renders any dispute over the date insignificant. *See infra* note 32.

cific complaint that he was passed over, they added allegations that white employees in their department were (1) disproportionately assigned to those jobs that would lead to the higher-paying positions, (2) disproportionately selected for temporary assignments that would prove an employee's ability to perform in a higher position, and (3) given the easier and cleaner work. On October 13, 1967, William Larkin filed a charge alleging that Pullman discriminated in its hiring and promotional practices. Finally, on October 15, 1969, Louis Swint filed a charge alleging that Pullman discriminated in its training and promotional practices.[12]

The EEOC consolidated all of the charges other than Swint's, and on April 26, 1972, issued its decision. The Commission concluded that there was reasonable cause to believe that Pullman had discriminated in "hiring, promotion, job assignments, terms and conditions of employment and the operation of an unlawful seniority system." Swint's charge appears not to have been similarly resolved. On September 22, 1971, before disposing of the case and at the request of Swint's attorney, the Commission issued Swint a letter advising him that he could institute a civil action within thirty days.

B. The Swint Case

Swint did so, seeking injunctive, declaratory, and monetary relief on behalf of himself and all other similarly situated black Pullman employees. His complaint, as amended, alleged that Pullman and USW (to the extent that the latter participated in a particular practice or was a party to a discriminatory practice because it was embodied in the collective bargaining agreement) had practiced racial discrimination in hiring, training, temporary assignments, promotions, and the maintenance of the sen-

12 This summary of the EEOC charges does not include any claim that the parties have agreed are no longer in the case, e.g., the claims that Pullman physicians maintained racially segregated facilities. Nor does it include later charges filed by Swint, because those charges are not relevant to the issues before the court.

iority system.[13] On June 4, 1974, in an order following the second pretrial conference, the district court certified the class Swint sought to represent:

> [T]he court finds and concludes that the prerequisites of Rule 23(a) and Rule 23(b)(2) are satisfied and that this action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company as production or maintenance employees represented by the United Steelworkers.

Record, Vol. II, Tab 18 at 1. According to the court, the parties had "made known certain facts to the court and . . . agreed that such facts may be considered by the court without formal hearing otherwise required under Rule 23." *Id.*

After sixteen days of trial testimony and the submission of numerous exhibits, the district court concluded that the plaintiffs had not proven that the seniority system of promotions was unlawful or that the selection of supervisors was discriminatory. *See Swint v. Pullman-Standard (Swint I)*, 11 F.E.P. 943, 954, 959 (N.D.Ala.1974) [available on WESTLAW, 1974 WL 262]. However, in the course of its discussion of the seniority system, the court found that, insofar as Pullman had maintained some single-race departments, it had discriminated in its assignments of new employees until as late as 1972. *See id.* at 953-54. The district court held that the proper remedy for this discrimination was to expand the transfer eligibility made available by the OFCC agreement.[14] *See id.* at 954.

---

13 As with the summary of the EEOC charges, this summary of Swint's allegations omits certain allegations that have no bearing on the issues before the court.

14 As noted above, the OFCC agreement provided that any black hired prior to April 30, 1965 and assigned to one of four all-black departments could transfer to any department without losing his seniority. The district court directed Pullman to set the eligibility dates (dates of employment) later with respect to three of the four black departments, so that the eligibility

On appeal, this court reversed the district court's conclusions on the seniority system and the selection of supervisors. *See Swint v. Pullman-Standard (Swint II)*, 539 F.2d 77, 93, 104 (5th Cir.1976). With respect to the seniority system, the court found that the district court had erroneously required the plaintiffs to prove that the discriminatory initial assignments caused classwide economic harm. *See id.* at 93. Segregation in and of itself, the court held, constituted discrimination in violation of Title VII, and if the seniority system perpetuated such discrimination,[15] it, and promotions pursuant to it, also would violate Title VII. *See id.* at 91. With respect to the selection of supervisors, the court found that two of the four grounds for the district court's decision were invalid.[16] *See id.* at 104. The case was remanded for whatever proceedings the district court felt were "appropriate or necessary" to comply with the opinion. *Id.* at 105.

On remand, a two-day hearing was held, at which additional evidence and briefs were submitted. While the district court was considering its decision, the Supreme Court issued its decision

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dates would correspond with the date on which discriminatory assignments to each of those three departmente ended. The OFCC agreement also provided that any black employee hired prior to April 30, 1965 could transfer to one of the four all-white departments without losing his seniority. The district court directed Pullman to again move the eligibility dates later insofar as a black employee wanted to transfer to one of three departments that remained all white until well after 1965.

15 *Swint II* was decided prior to the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 396 (1977). As will be discussed, *Teamsters* reversed this circuit's holdings that any seniority system that perpetuated past discrimination could not be bona fide and thus protected under 42 U.S.C. § 2000e-2(h) (1982).

16 The court held that the district court should not have treated literacy as the explanation for the racial discrepancy unless it had been proven a business necessity. The court also rejected the district court's reliance on his conclusion that pre-1965 discrimination had prevented blacks from gaining the skill and experience they needed to be able to supervise. That justification would have been valid, the court held, only if Pullman had shown that the skills were a business necessity and that blacks did in fact lack them. *See Swint II*, 539 F.2d at 104.

in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The Court rejected what had become this circuit's standard approach to seniority systems. *See, e.g., United States v. T.I.M.E.-D.C.*, 517 F.2d 299, 320 (5th Cir.1975) (collecting cases), *rev'd sub nom. International Brotherhood of Teamsters v. United States*, 431 U.S. at 324, 97 S.Ct. at 1843; *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 987-88 (5th Cir.1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970). Plaintiffs could not prevail, the Court held, simply by showing that a seniority system perpetuated the effects of pre-Title VII discrimination. *See Teamsters*, 431 U.S. at 353-54, 97 S.Ct. at 1864. To overcome the bona fide seniority system exception, *see* 42 U.S.C. § 2000e-2(h) (1982), plaintiffs had to show that a seniority system was established or maintained with discriminatory intent. *See Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1865; *see also Trans World Airlines v. Hardison*, 432 U.S. 63, 82, 97 S.Ct. 2264, 2275, 53 L.Ed.2d 113 (1977).

Relying on *Teamsters*, the district court again held for Pullman on the promotions issue. *See Swint v. Pullman-Standard (Swint III)*, 15 F.E.P. 144, 147 (N.D.Ala.1977) [available on WESTLAW, 1977 WL 888]. Realizing that it would have to focus on post-Act discrimination, the court assumed that the liability period should be dated from December 27, 1966: "To give plaintiffs' [sic] the benefit of the doubt, the court has in this opinion used the earliest possible date, i.e., 90 days before the March 27, 1967 Commissioner's charge, while nevertheless having substantial reservations that such a date is proper." *Id.* at 146 n. 5. It then found that by December 1966 the company was no longer making assignments to departments based on race. The court acknowledged that this finding conflicted with its findings in *Swint I*, but concluded that its original decision, "based largely upon a mechanical application of statistical data respecting a few departments, was incorrect." *Id.* at 149. The court also held that Pullman had not discriminated in its selection of supervisors. The court's calculations revealed no statistically significant disparity in the number of blacks and whites

chosen,[17] and, in any event, Pullman had demonstrated that experience as a temporary foreman—which, due to *pre-Act* discrimination blacks were less likely to have—was a bona fide occupational qualification. *See id.* at 150-52.

The plaintiffs filed a motion to amend the judgment with respect to the court's language on the date from which Pullman's liability was measured. They argued that the liability period should have been backdated from the Commissioner's charge 180 rather than 90 days, due to a 1972 amendment to Title VII that extended the time for filing. The court wrote that "[p]laintiffs are probably correct," but found that even if a September date were used, its finding that Pullman had not discriminated during the liability period would stand. *Swint v. Pullman-Standard (Swint IV)*, 15 F.E.P. 1638, 1639 (N.D. Ala.1977) [available on WESTLAW, 1977 WL 40]. The plaintiffs also asked for a new trial on the seniority system on the ground that they had proceeded to trial on an accepted theory that *Teamsters* reversed. The court granted that motion. *See id.* at 1640.

The evidence presented at the third trial did not alter the district court's conclusion. Operating under the four-factor framework this court had set forth (after *Teamsters*) in *James v. Stockham Valve & Fittings Co.*, 559 F.2d 310 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978), the court held that three of the factors as well as the totality of the circumstances indicated that the seniority system did not reflect an intent to discrimnate. *See Swint v. Pullman-Standard (Swint V)*, 17 F.E.P. 730, 739 (N.D.Ala.1978) [available on WESTLAW, 1978 WL 115]. The court was unimpressed with the plaintiffs' showing that blacks appeared to be locked into the least economically desirable departments, asserting that this court had precluded any consideration of economic unfairness:

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17 The court found that "the number of blacks appointed to salaried supervisory positions is less than two standard deviations from the number expected from the composition of temporary foremen." *Swint III*, 15 F.E.P. at 151. The court acknowledged that there was a disparity of "some 2.54 standard deviations" in the Welding department, by far the largest department at the plant.

> [T]he rationale of the Fifth Circuit in Pullman-Standard II indicates that such a study of relative economic desirability would be inappropriate. If one is to measure inequality without reference to economic desirability, it would seem logical to measure its opposite—equality or neutrality—without reference to such desirability.

Id. at 734.

On appeal, this court reversed and remanded "for proceedings necessary to render appropriate relief." *Swint v. Pullman-Standard (Swint VI)*, 624 F.2d 525, 526 (5th Cir.1980). In independent sections of its opinion, the court held that Pullman had violated Title VII in its assignments to departments, its system of nontransferable seniority, and its selection of supervisors. With respect to departmental assignments, the court cited several numerical mistakes in the district court's calculations and concluded that the district court's ruling was "factually unsubstantiated." *See id.* at 529. With respect to the seniority system, the court found several errors in the district court's analysis. First, the district court had been unreasonable in construing *Swint II* to preclude any consideration of the fact that blacks were relegated to the economically undesirable departments; *Swint II* merely held that discrimination could take a non-economic form as well as an economic one. *See id.* at 530-31. Second, the district court had no basis on which to find the seniority system rational: "[n]o credible explanation has been advanced to sufficiently justify the separate seniority units." *Id.* at 531, 533. Third, the district court improperly rejected any consideration of IAM's role in the creation of nontransferable seniority, given IAM's undisputed past efforts to exclude blacks from its bargaining units. *Id.*; *see supra* note 8. On the last issue, the selection of supervisors, the court found that Pullman had failed to show that requiring salaried supervisors to come from the ranks of the temporary supervisors was a business necessity. The court noted further that Pullman had not articulated any particular skills necessary to performing as either a

temporary or salaried supervisor.[18] *See Swint VI*, 624 F.2d at 535-36.

The Supreme Court granted certiorari to consider the seniority system issue and reversed. *See Pullman-Standard v. Swint (Swint VII)*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). The majority held that this court, despite stating that it was applying a clearly erroneous standard to the district court's finding of no intentional discrimination, had improperly weighed the evidence and entered factual findings of its own. The proper procedure would have been to review the record only for clear error and then remand to the district court for reconsideration. *Id.* at 292, 102 S.Ct. at 1792. The Court did not specify the aspects of *Swint VI* that it considered factfinding.

The opinion remanding the case to the district court directed it to conduct whatever proceedings it felt necessary to comply with *Swint VI* and *Swint VII* and "to determine what impact the 'locking-in' of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the discriminatory motivation of IAM with respect to the institution of USW's seniority system." *Swint v. Pullman-Standard (Swint VIII)*, 692 F.2d 1031, 1031-32 (5th Cir. 1982). A fourth trial was held, and the district court

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18 Despite holding that the plaintiffs were entitled to judgment in their favor on all three liability issues, the court did not specify the time period for which Pullman was liable. Its only discussion of the EEOC charges was as follows:

> Although the first primary charge directly bringing into question the company's assignment policies was filed on May 11, 1970, a charge had been previously filed by an EEOC Commissioner on March 27, 1967 questioning the hiring and promotion practices of Pullman. Because the district court found this earlier charge to be susceptible to the interpretation that it related also to assignment and transfer matters, the court used the date 90 days before the March 27, 1967 Commission charge for its analysis.
>
> The 1972 amendment to Title VII extended the time for filing charges to 180 days, and this extension has been considered to be effective retroactively. . . . But, the district court asserts that it finds there was no practice of discriminatory assignments to departments after September 28, 1966 anymore than there was after December 27, 1966. The 180 day statutory period is inconsequential to this analysis. *Swint VI*, 624 F.2d at 528 n. 1.

entered the decisions that gave rise to two of these appeals. *See Swint v. Pullman-Standard (Swint IX)*, No. CV71-P-0955-S, slip op. (N.D.Ala. Sept. 8, 1986), Record, Vol. II, Tab. 133; *Swint v. Pullman-Standard (Swint X)*, No. CV71-P-0955-S, slip op. (N.D.Ala. Nov. 26, 1986), Record, Vol. II, Tab 136. Without discussion, the court concluded that it was bound by *Swint VI* to find Pullman liable for discriminating both in its departmental assignments and in its selection of supervisors. *Swint IX*, slip op. at 8, 11. The court rejected Pullman's argument that Swint did not have standing to represent the class on the departmental assignment claim. On the promotions issue, however, the court found the seniority system bona fide and entered judgment in favor of Pullman and USW. *See id.* at 11.

In view of its ruling that there had been discrimination in departmental assignments and the selection of supervisors, the court was faced squarely with defining the temporal scope of Pullman's liability. Relying on *Payne v. Travenol Laboratories*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982), the court held that the liability period should be dated from ninety days prior to the date of Swint's first EEOC charge, i.e., Pullman would not be liable for any discrimination occurring prior to July 17, 1969.[19] *See Swint IX*, slip op. at 6. The court then found that any discrimination in departmental assignments ended prior to February 1969. *See id.* at 13. The bottom line was that there was no discrimination in departmental assignments for which Pullman would have to pay damages. The date on which discrimination in the selection of supervisors ended, the court held, had in effect been set by *Swint VI*. Pullman would be liable for dis-

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19 The plaintiffs filed a motion to alter or amend the judgment asking the court to apply Alabama's six-year trespass statute of limitations to the section 1981 claims in their case. This would have, at least to the extent that the plaintiffs were able to show intentional discrimination (which section 1981 claims require), worked to extend the liability period backward to 1965. The court refused to alter its previous application of the one-year trespass on the case statute, citing Pullman's reliance throughout the litigation on that decision. *Swint v. Pullman-Standard (Swint X)*, No. CV71-P-0955-S, slip op. at 3 (N.D.Ala. Nov. 26, 1986), Record, Vol. II, Tab 136 at 3.

crimination in the selection of supervisors from July 16, 1969 to August 16, 1974.[20] *See id.* at 8.

The plaintiffs appeal the rulings against them on the seniority system, the date from which Pullman's liability was measured, and the date that discrimination in departmental assignments ended. Pullman, having been granted leave to appeal immediately under 28 U.S.C. § 1292 (1982), appeals the rulings against it on the selection of supervisors and on Louis Swint's standing to represent the class with respect to departmental assignments.[21]

C. The Larkin Case

Some four years after Louis Swint filed suit against Pullman and USW, on December 9, 1975, the *Larkin* plaintiffs filed a class action against Pullman alone. The complaint alleged that Pullman had excluded blacks from its more desirable jobs and departments and its salaried foremen jobs. On January 20, 1976, the district court dismissed the *Larkin* case with prejudice, finding "that all issues presented by the complaint are presently on appeal to the Fifth Circuit Court of Appeals in the case of Louis Swint, . . . and that plaintiffs herein are included in the putative class of plaintiffs on whose behalf said appeal was taken." *Larkin v. Pullman-Standard Division, Pullman, Inc. (Larkin I)*, No. 75-G-2266-S, slip op. at 1 (N.D.Ala. Jan. 20, 1976), Record, Vol. I, Tab 4, at 1. The *Larkin* plaintiffs appealed, but the appeal was ultimately dismissed for failure to prosecute. *Larkin v. Pullman-Standard Division, Pullman, Inc. (Larkin II)*, No. 76-1538, slip op. at 1 (5th Cir. Apr. 15, 1976), Record, Vol. I, Tab 6, at 1.

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20 It is unclear how the district court arrived at the August 16 date. 1974 appears to have been chosen because the plaintiffs had presented statistical evidence through that date and this court did not distinguish periods of time when, in *Swint VI*, it found that there had been discrimination. *See Swint IX*, slip op. at 8.

21 USW remains in the case only as an appellee, because the only issue still disputed and involving USW is whether or not the seniority system was bona fide rather than intentionally discriminatory. For that reason, the bulk of this opinion will refer to Pullman alone.

Nothing further happened in the *Larkin* case for several years. In June 1983, however, after this court in *Swint VIII* remanded the *Swint* litigation to the district court, Pullman began urging the *Swint* district court to consider running the liability period from a later date, as of 1969 rather than 1966. Pullman argued that the beginning of the liability period could be based only on the charge of a *named* plaintiff, i.e., on Louis Swint's October 1969 charge. Concerned that such a decision would preclude consideration of claims that the *Larkin* court had dismissed precisely because they were to be considered in *Swint*, the *Swint* plaintiffs moved, in February 1984, to add Spurgeon Seals (a *Larkin* plaintiff who had filed his EEOC charge on November 4, 1966) as an additional named plaintiff. A motion to add all of the *Larkin* plaintiffs as named *Swint* plaintiffs was filed on June 4, 1984.

Pullman allegedly[22] opposed the motions to add the *Larkin* plaintiffs on the ground that *Larkin I*, which included the language, "dismissed with prejudice," constituted an adjudication on the merits that prevented the *Larkin* plaintiffs from pursuing any of their claims against Pullman in *Swint*. The *Larkin* plaintiffs responded by returning to the *Larkin* court and filing a motion for relief from judgment under Fed.R.Civ.P. 60(a) or 60(b)(6). The plaintiffs asked the court to delete the words "with prejudice" from the *Larkin I* order. "[R]eluctant to alter in any way an order of judgment which is over eight years old," the *Larkin* court denied the motion. *Larkin v. Pullman-Standard Division, Pullman, Inc. (Larkin III)*, No. 75-G-2266-S, slip op. at 1 (N.D.Ala., Apr. 16, 1984), Record, Vol. I, Tab 8, at 1. The court made clear, however, that *Larkin I* constituted "no opinion as to the rights which these plaintiffs might have as unnamed members of the *Swint* class." *Id.* at 2.

Soon thereafter, without opinion, the *Swint* court denied both of the motions to add the *Larkin* plaintiffs. *See Swint v. Pullman-Standard*, No. CV-71-P-0955-S, slip op. (N.D.Ala. Sept. 4, 1984). In *Swint IX*, the court explained the grounds for the denial: the delay in filing the motions was unreasonable,

22 It appears that Pullman did not file a written response to the plaintiffs' motions to add the *Larkin* plaintiffs, so we have been unable to verify that Pullman actually made this argument.

permitting the intervention would prejudice Pullman, and the *Larkin* plaintiffs would not suffer any prejudice if not permitted to intervene. *See Swint IX*, slip op. at 3-4. The court acknowledged, however, that *Larkin I* did not preclude the *Larkin* plaintiffs' membership in the *Swint* class. *See id.* at 4.

The *Larkin* plaintiffs timely appealed from the judgment in *Larkin III*. This court stayed the appeal pending the outcome on remand in *Swint*. After *Swint IX* and *Swint X* were appealed, the court consolidated the *Swint* and *Larkin* cases.

III. The Liability Period

The first dispute we must resolve concerns the date from which Pullman's liability[23] must be measured. With respect to the plaintiffs' Title VII claims, the district court held that only the charge of a named plaintiff could be used to start the liability period running and that the period would begin 90, rather than 180, days before Louis Swint's charge was filed. *See Swint IX*, slip op. at 6. With respect to the plaintiffs' section 1981 claims, the court held that liability had to be measured from one year prior to the plaintiffs' filing suit, because Alabama's one-year, trespass on the case statute of limitations was the most appropriate to section 1981 claims. *See Swint X*, slip op. at 3; *supra* note 19.

We will discuss both of these holdings separately. In certain cases, it is necessary only to address whichever approach yields the earliest date of potential liability. Unfortunately, we are unable to do so here. On one of the substantive claims—that involving the selection of supervisors—the plaintiffs appear to have proceeded not on a theory of intentional discrimination but on a theory of disparate impact. Because section 1981 requires a showing of intentional discrimination, *see Stallworth v. Shuler*, 777 F.2d 1431, 1433 (11th Cir. 1985), the plaintiffs are potentially entitled to relief on this claim only under Title

23 We address only Pullman's liability. As will become clear later in the opinion, we affirm the district court's ruling that USW has not violated Title VII or § 1981.

VII, and will not be able to benefit from the longer liability period we adopt for the section 1981 claims.

A. Dating the Title VII Claims

Title VII requires that an employee file an EEOC charge within 180 days[24] of an allegedly illegal employment practice if he intends to bring a civil suit based on that practice. *See* 42 U.S.C. § 2000e-5(e) (1982). In addition to operating as statute of limitations, this requirement has been interpreted to shield a Title VII defendant from damages for any like conduct he may have engaged in prior to 180 days before the filing of a charge.[25] *See United Air Lines v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977); *Fisher v. Proctor & Gamble Manufacturing Co.*, 613 F.2d 527, 540 & n. 25 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115, 101 S.Ct. 929, 66 L.Ed.2d 845 (1981). The issue here involves the latter aspect of the 180-day period: selecting the appropriate EEOC charge to establish the date Pullman's liability commences.

The plaintiffs argue that dating the liability period from the first EEOC charge complaining of like practices, regardless of whether the charge was filed by a named plaintiff, is the correct approach. They also contend that by dating Pullman's Title VII liability from Louis Swint's October 1969 charge, the district court violated the law of the case. They point to the court's 1974 certification of the class, which included "all black per-

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24 On March 24, 1972, Title VII was amended to extend the filing period from 90 days to 180 days. *See* Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, § 4(a), 86 Stat. 103, 105 (1972) (codified at 42 U.S.C. § 2000e-5(e) (1982)). The retroactivity of this amendment will be discussed in connection with the district court's backdating Swint's charge 90 rather than 180 days.

25 At first blush, the statement in the text may seem tautologous. It is conceivable, however, that, in the continuing violation context, a plaintiff could file a charge within 180 days of the violation, thereby meeting the statute of limitations, and still attempt to recover damages for harmful effects suffered well before 180 days prior to the EEOC charge. In addition, it is important to distinguish the two concepts in class actions, where class members who did not themselves file EEOC charges will be bound, and may be foreclosed from recovery, by the liability period that someone else's charge creates.

sons who are now or have (within one year prior to the filing of *any* charges under Title VII) been employed by defendant Company." Record, Vol. II, Tab 18 at 1 (emphasis added). In the plaintiffs' view, this constituted a holding that liability would be measured from Seals' November 1966 charge. The plaintiffs also cite the court's discussion in *Swint III*, where the court assumed that liability should be dated from 90 days prior to Commissioner Shulman's March 1967 charge. 15 F.E.P. at 146 n. 5. Finally, the plaintiffs direct us to the pretrial order entered prior to the last trial, in 1984. The district court there instructed the parties to prepare for trial on the assumption that the anterior cutoff date would be 180 days prior to Seals' EEOC charge. Record, Vol. II, Tab 96 at 1; *see supra* note 25.

The plaintiffs maintain further that despite all these suggestions, if not holdings, that the liability period would be dated from 1966, it was not until 1983 and the rulings against it in *Swint VI* that Pullman raised any objection to a 1966 cutoff date. Thus, even if Swint's charge should have been the one from which liability was dated, Pullman waived any objection it might have had. To find otherwise, the plaintiffs contend, would be especially inequitable given the decision in *Larkin I* that the *Larkin* plaintiffs' claims were precluded because they were adequately covered by the *Swint* litigation: the *Larkin* court surely would not have so decided had it been aware that three years of the plaintiffs' claims were going to be severed from *Swint* on the fourth trial of the case.

Pullman asserts that the plaintiffs' representation of the district court's decisions is inaccurate and that none of the district court's discussions constituted a holding on the liability period. As a result, the law of the case did not preclude the district court's setting the July 17, 1969 date, and under *Kilgo v. Bowman Transportation Inc.*, 789 F.2d 859 (11th Cir. 1986), and *Payne v. Travenol Laboratories*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982), a Title VII liability period can be dated only from a *named plaintiff's* charge. Pullman also insists that the standing principles enunciated in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), dic-

tate that a named plaintiff cannot represent class members on claims that accrued before his own.

We hold that the district court erred in dating Pullman's potential liability from 90 days prior to Swint's EEOC charge. The circumstances of this case, when combined with Title VII's role as remedial legislation, convince us that the district court improperly narrowed the *Swint* litigation after the fourth trial of the case. Pullman's potential Title VII liability should have been dated from September 28, 1966, 180 days prior to Commissioner Shulman's charge alleging that Pullman had discriminated in its hiring and promotional practices.

It is apparent that Pullman waived any objection it might have had to such a date. The district court discussed the case from the very beginning as if Pullman's potential liability might be dated from 1966. Due to its various dispositions of the case, the district court stopped short of so *holding*; for that reason, the law of the case does not require us to accept a 1966 date. *See Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164, 1169 (5th Cir. Unit A Sept. 1981) ("law of the case does not operate to bar subsequent consideration of matters that could have been, but were not, raised and resolved in the earlier proceeding"), *cert. denied*, 455 U.S. 944, 102 S.Ct. 1441, 71 L.Ed.2d 656 (1982); *see also Robinson v. Parrish*, 720 F.2d 1548, 1550 (11th Cir. 1983) (district court need not "rigidly adhere to its own rulings in an earlier stage of a case"). Even so, the 180-day filing requirement, "like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). Insofar as the liability period is simply the inverse of the filing requirement, it too must be subject to waiver and estoppel. By failing before 1983 to raise any objection to the numerous suggestions that 1966 might be set as the anterior cutoff date for its liability, as well as arguing in the *Larkin* case that the *Larkin* plaintiffs' claims—which indisputably dated back to 1966—were being litigated in the *Swint* case, Pullman waived any objection it might otherwise have had.[26]

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26 There is a strategic reason why a class action defendant might waive objections to the size or inclusiveness of a class: a favorable decision against an all-inclusive class of plaintiffs will in many instances bar further suits.

In any event, in this case dating liability from 1966 is the most appropriate and logical holding. In considering this issue, it is important to look at the purposes of the 180-day filing requirement, insofar as that requirement dictates the liability period. It is well-established that potential plaintiffs are required to file an EEOC charge within 180 days of an allegedly illegal act or practice so that employers will be given prompt notice of the complaints against them, and the EEOC sufficient time to attempt the conciliation process before a civil action is filed. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 398, 102 S.Ct. at 1135; *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d at 877; *Crawford v. United States Steel Corp.*, 660 F.2d 663, 666 (5th Cir. Unit B Nov. 1981). Neither of these purposes would be defeated by permitting the charge of the Commission to establish the temporal scope of this action. Spurgeon Seals filed an EEOC charge in November 1966 complaining that the seniority system was being misapplied on account of his race, and less than six months later, an EEOC Commissioner filed a charge launching a broad-based challenge to Pullman's hiring and promotional practices. By the time Louis Swint filed his 1969 charge, Pullman was well aware that its hiring and promotional practices were under scrutiny, and the EEOC had been given ample time to attempt conciliation. To ignore this and restrict Pullman's liability to 180 days prior to Swint's charge would be nothing more than a technical reading of Title VII, which is "particularly inappropriate in a statutory scheme in which lay-ment, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.Ct. 616, 619, 30 L.Ed.2d 679 (1972).

Indeed, one case from this circuit (cited, oddly, by Pullman) has already held that, in appropriate circumstances, liability may be dated from the EEOC charge of a person other than one of the named plaintiffs.[27] In *Kilgo v. Bowman Transportation, Inc.*, Edna Kilgo, who had filed an EEOC charge earlier than

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27 The Seventh Circuit and several district courts have so decided as well. *See McDonald v. United Airlines*, 587 F.2d 357, 361 (7th Cir. 1978) (liability could be dated from charge filed by two class members who were not named plaintiffs where their charges gave the employer sufficient notice that

any other member of the class, died before the class was certified. Her husband was permitted to substitute for her as a class member, but was found an inadequate class representative to serve as a named plaintiff. After concluding that the purposes of the 180-day filing requirement had been met by Kilgo's charge—the employer had notice of the claim and the EEOC was given an opportunity to settle the grievance—this court held that the date of her EEOC filing could be used to determine the temporal scope of the action. *See Kilgo*, 789 F.2d at 877. Not only was this result fair to the employer, in that it turned on his receiving adequate notice, but it advanced judicial economy by ensuring that all the claims of employees discriminated against in similar fashion were heard in a single action.[28] The same can be said of our decision to permit the charge of a nonnamed plaintiff to establish the temporal scope of the action.[29]

Pullman asserts that *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. at 147, 102 S.Ct. at 2364, 72 L.Ed.2d at 740, prevents using a non-named plaintiff's charge to date lia-

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certain practices were challenged), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979); *Allen v. Isaac*, 99 F.R.D. 45, 50 (N.D.Ill. 1983); *Williamson v. Bethlehem Steel Corp.*, 488 F.Supp. 827, 830-35 (W.D.N.Y. 1980); *Petty v. Peoples Gas Light & Coke Co.*, 86 F.R.D. 336, 342 (N.D.Ill. 1979); *see also Inda v. United Airlines*, 83 F.R.D. 1, 7-8 (N.D.Cal. 1979).

28 To insist that liability be dated only from a named plaintiff's charge would essentially force whomever in a class of employees filed the earliest EEOC charge to do one of three things: act as the class representative, file a separate action covering the period of time that would not be covered by the class suit, or give up altogether a portion of his claim. Noting that there are many reasons a class member might not wish or be able to act as his class' representative, we reject the opportunity to fashion a per se rule that would have this effect.

29 We do not, of course, address the situation when a class member files an EEOC charge and receives a right-to-sue letter, and then no suit is filed within the period specified by the letter. The situation here is quite different. The charges filed by the *Larkin* plaintiffs and Commissioner Shulman were still pending before the Commission when Swint filed suit, so there was no indication that those who filed the earliest charges intended to abandon their causes of action.

bility. In *Falcon*, the Supreme Court held that a person who has not himself suffered a particular type of discrimination does not have Rule 23(a) standing to bring a class action for those who have, simply because he and the class have both suffered forms of racial discrimination. *See id.* at 158, 102 S.Ct. at 2371. Pullman apparently reasons from this that a class representative also cannot represent class members on portions of their claims for which the representative would not, due to the 180-day filing requirement, have been able to sue; reasoning backward from this proposition, Pullman concludes that liability must be dated from the named plaintiff's charge. The company also argues that it could not have waived any objections to a 1966 date because standing is a *jurisdictional* and thus non-waivable issue.

We do not agree. First, the Court made clear in *Falcon* that its decision was based on the commonality and typicality requirements of Fed.R.Civ.P. 23(a), and there is no reference in the opinion to the constitutional requirement of standing.[30] *See id.* at 160, 102 S.Ct. at 2372 ("The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)."). Because Rule 23's requirements have never been regarded as jurisdictional,[31] Pullman's argument that it cannot have waived any objections to a 1966 date is without merit. *See*,

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30 Indeed, the word "standing" appears only one time in the entire opinion, in a footnote: "The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Falcon*, 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n.15. We do not read this statement as a reference to constitutional, jurisdictional standing.

31 The Supreme Court has recognized that the Congress that enacted Federal Rule 23 was advised that it would neither expand nor constrict subject matter jurisdiction. *See Snyder v. Harris*, 394 U.S. 332, 341, 89 S.Ct. 1053, 1059, 22 L.Ed.2d 319 (1969). It follows that the requirements of Rule 23 are not jurisdictional requirements that cannot be waived. *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-57, 96 S.Ct. 1251, 1258-60, 47 L.Ed.2d 444 (1976) (class retains standing despite mooting of named plaintiff's Title VII claim).

e.g., *Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 224 (D.C. Cir. 1981) ("[a] claim that the district court erred in its class certification decision does not go to the court's subject matter jurisdiction"); *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 912-13 (9th Cir. 1964) (the requirements of Federal Rule 23(a) are not jurisdictional). This seems all the more apparent when one remembers that the liability period derives directly from the 180-day filing requirement, which the Supreme Court has expressly held is in the nature of a statute of limitations and waivable. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 398, 102 S.Ct. at 1135.

Second, even if we were to read *Falcon* as a case involving a jurisdictional type of standing, it does not necessarily follow from a requirement that a named plaintiff have suffered the same type of injury as those he represents that he is also required to have suffered it (*and* filed an EEOC charge) at precisely the same time. *Cf. Domingo v. New England Fish Co.*, 727 F.2d 1429, 1442 (9th Cir. 1984) (named plaintiff may represent all class members whose claims were not already time-barred at the time he filed his charge); *Spalitta v. National American Bank of New Orleans*, 444 F.2d 291, 294 (5th Cir.) (named plaintiff could represent stockholders on certain fraud claims even if the frauds did not occur while the plaintiff was a stockholder), *cert. denied*, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 164 (1971). The commonality and typicality requirements of Federal Rule 23(a) are phrased in substantive terms: a party may sue on behalf of a class only if "(2) there are questions of law or fact common to the class, [and] (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(2), (3). A disparity in the forms of discrimination suffered will cause the questions of law and fact and the claims and defenses of the named plaintiff and the class members to be different. In contrast, a disparity in the dates on which the named plaintiff and other class members filed EEOC charges does not mean that the legal questions or the claims will be different.

Our holdings that Pullman waived any objection to a 1966 date and that a non-named plaintiff's charge may govern do not end our inquiry. We must still determine which of the EEOC

charges could give rise to the class claims that were ultimately brought. Unless a charge alleges practices "like or related to" the practices alleged in the complaint, it cannot serve as the basis for a civil action. *See Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 928 (11th Cir. 1983); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). The Supreme Court has elaborated on this "like or related to" test: "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *General Telephone Co. v. EEOC*, 446 U.S. 318, 331, 100 S.Ct. 1698, 1706, 64 L.Ed.2d 319 (1980).

Having considered these principles, we conclude that Commissioner Shulman's March 1967 charge is the earliest charge including allegations sufficiently like or related to those in the complaint.[32] The charge alleged that Pullman had discriminated in its hiring and promotional practices. The investigation that followed addressed every practice that would ultimately be challenged in Swint's complaint: initial assignments to departments and jobs, temporary assignments, opportunities for training, promotions, the seniority system, and the selection of supervisors. Pullman thus received more than sufficient notice that several of its plantwide policies and practices were under attack.

Pullman argues that the Commissioner's charge cannot be used as a basis for Swint's suit because certain statutory requirements were not met. The language on which the Company relies is as follows:

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32 The plaintiffs' brief to this court suggests that Spurgeon Seals' November 1966 charge could be used to date the liability period. On June 6, 1983, the plaintiffs filed a motion expressly asking the district court to date Pullman's liability from Commissioner's Shulman's *March 1967* charge. In light of the numerous allegations already in the case that given arguments have been waived or are foreclosed by the law of the case, we find the plaintiffs' failure to acknowledge that they made this argument very irritating. In any event, we are not convinced that Seals' charge was sufficiently like or related to the charges in Swint's complaint. It alleged that the seniority system was discriminatorily mis*applied*, not that the seniority or assignment systems were in themselves discriminatory.

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . *shall so notify the person aggrieved* and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom *the charge alleges was aggrieved* by the alleged unlawful employment practice.

42 U.S.C. § 2000e-5(f)(1) (1982) (emphasis added). Directing us to the emphasized language, the company complains that Swint was not named in the charge and that the Commission did not issue Swint a right-to-sue letter in connection with the proceeding involving the *Commissioner's* charge. We reject this argument for several reasons. First, Pullman presents this challenge for the first time on appeal and we can perceive no miscarriage of justice that might result from following the general rule that such challenges will not be considered. *See Sanders v. United States*, 740 F.2d 886, 888 (11th Cir. 1984); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 989-90 (11th Cir. 1982). Pullman had adequate opportunity to raise these arguments before the district court, especially after the plaintiffs filed a specific written request that the court date liability from the Commissioner's charge. Second, Pullman's claim that Swint had to be expressly named in the Commissioner's charge to qualify as an "aggrieved" individual under the statute is specious. The statute expresses a clear congressional intent that private suits be permitted to proceed on Commissioner's charges. Pullman's interpretation conflicts with that intent because it would essentially prohibit suits where a Commissioner acts on behalf of a class so large—such as "black employees of Pullman-Standard's Bessemer, Alabama

plant''—that every member cannot be named. Finally, assuming without deciding that the statute required Swint to obtain a separate right-to-sue letter in connection with the Commissioner's charge—he did obtain one in connection with his *own* EEOC charge—any such defect was cured when the plaintiffs introduced the EEOC decision concerning the Commissioner's charge into evidence. *See Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1219 (11th Cir. 1982) (''the receipt of a right-to-sue letter subsequent to the commencement of a Title VII action, but while the action remains pending, satisfies the precondition that a plaintiff obtain statutory notice of the right to sue before filing a civil action''), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983). It is well-settled that the requirement that a plaintiff receive a right-to-sue letter is subject to equitable modification. *See id.* at 1218-19. It is also clear that the purpose of the requirement is to provide the employee with notice that his administrative remedies with the Commission have been exhausted, *see Beverly v. Lone Star Lead Construction Corp.*, 437 F.2d 1136, 1140 (5th Cir. 1971), and in turn ensure that the employee has given the EEOC time to take action on the case. The EEOC's written decision finding that there was reasonable cause to believe that Pullman had violated Title VII served this purpose as well as any right-to-sue letter would have.

Pullman's potential liability on the plaintiffs' Title VII claims dates from September 28, 1966, 180 days prior to Commissioner Shulman's charge. At the time the Commissioner's charge was filed, the period within which a charge had to be filed—and thus the liability period—was 90 days, *see* 42 U.S.C. § 2000e(5)(e) (1970), but an amendment to Title VII in 1972 increased the period to 180 days. The amending legislation stated that it was to apply to anyone whose charges were pending before the Commission when the legislation was passed. *See* Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, § 14, 86 Stat. 103, 113. The amendment was enacted on March 24, 1972, and the Commission's final decision on Commissioner Shulman's charge issued on April 26, 1972. Shulman's charge should thus be backdated 180, rather than 90, days.

B. Dating the Section 1981 Claims

Although section 1981 provides a federal cause of action, claims under it must be brought within the period set by the most appropriate statute of limitations of the state in which the court sits. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975); *Whatley v. Department of Education*, 673 F.2d 873, 874 (5th Cir. 1982). The length of the statute of limitations will in turn establish how far back from the filing of the complaint the liability period will reach. *See Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1255 (5th Cir. 1979), *aff'd on rehearing*, 619 F.2d 459, 463 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). Since the racial discrimination section 1981 prohibits is "a fundamental injury to the individual rights of a person," the applicable statute of limitations will be one governing personal injury, as opposed to contract, actions. *Goodman v. Lukens Steel Co.*, ____ U.S. ____, ____, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987); *see also Wilson v. Garcia*, 471 U.S. 261, 275, 105 S.Ct. 1938, 1947, 85 L.Ed.2d 254 (1985) (section 1983 actions should be treated as if for personal injury). The problem here is that when Swint filed suit, Alabama had *two* statutes of limitations that applied to personal injury actions. Sections 6-2-34(1) provided that "[a]ctions for any trespass to person or liberty" must be brought within six years. Ala.Code § 6-2-34(1) (1977). Section 6-2-39(a)(5) provided that "[a]ctions for any injury to the person or rights of another not arising from contract" must be brought within one year. *Id.* § 6-2-39(a)(5) (repealed 1984).

The plaintiffs argue that the six-year statute, section 6-2-34(1), applies. They cite this court's 1985 decision in *Jones v. Preuit & Mauldin*, 763 F.2d 1250, 1256 (11th Cir. 1985), that the six-year statute applies to section 1983 claims. They then rely on *Goodman v. Lukens Steel*, 107 S.Ct. at 2621, for the proposition that the same statute of limitations should be applied to section 1981 actions as is applied to those under section 1983.

Pullman insists that the one-year statute, section 6-2-39(a)(5), applies. The company likens this employment discrimination

case to a tort action for interference with contractual relations and cites Alabama cases holding that such actions are governed by section 6-2-39(a)(5). *See, e.g., Teng v. Saha*, 477 So.2d 378, 379 (Ala.1985). Pullman also contends that even if we now deem the six-year statute applicable, presumably on the authority of recent cases, those cases should not be applied retroactively because the company has relied throughout the litigation on the one-year period.

We agree with the plaintiffs that the six-year statute should be applied. *Goodman* directs us to adopt the same state statute of limitations for both section 1983 and section 1981 actions, and this court has already adopted the six-year statute for section 1983 claims brought in Alabama. *See Jones v. Preuit & Mauldin*, 763 F.2d at 1256. We also conclude that retroactive application of the six-year statute is appropriate on the facts of this case.

In *Goodman*, 107 S.Ct. at 2621, the Supreme Court held that the employees' section 1981 action was subject to Pennsylvania's two-year statute of limitations governing personal injury actions. The employees had argued that the six-year state statute of limitations applicable to interference with contractual relations was the most appropriate. *See id.* The employees recognized that, under *Wilson v. Garcia*, 471 U.S. at 268, 105 S.Ct. at 1943, section *1983* actions were to be treated as personal injury actions, but they argued that section *1981* actions should be characterized differently under federal law because the paradigmatic section 1981 claim involved economic, rather than personal, rights. *See Goodman*, 107 S.Ct. at 2621. The Court disagreed. Justice White, writing for the Court, stated:

> *Wilson's* characterization of § 1983 claims is . . . . *equally appropriate* here, *particularly since § 1983 would reach state action that encroaches on the rights protected by § 1981.* That § 1981 has far-reaching economic consequences does not change this conclusion, since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.

Id. (emphasis added). We are convinced from this language that the Court intended that the same statute of limitations be applied to all section 1983 and section 1981 actions in a given state. The Court's reference to the overlap between the two civil rights statutes suggests that it would not approve a characterization of section 1983 claims as one type of personal injury and a characterization of section 1981 claims as another type of personal injury.

We are additionally persuaded that this conclusion is correct by the history of *Goodman* before it reached the Supreme Court. The Third Circuit had taken the case under en banc consideration, and had concluded not only that the employees' claims were governed by Pennsylvania's general personal injury statute of limitations, but that the federal interests in uniformity and certainty were "best served by applying the same statute of limitations to all of the Reconstruction Civil Rights Cases." *Goodman v. Lukens Steel Corp.*, 777 F.2d 113, 120 (3d Cir. 1985). In affirming, the Supreme Court apparently was not troubled by the latter proposition. Justice White stated flatly: "The Court of Appeals properly rejected [the plaintiffs'] submission." *Goodman v. Lukens Steel*, 107 S.Ct. at 2621.

Even without the language in *Goodman*, we would consider this a sound result as a policy matter. In *Wilson v. Garcia*, the Court recognized that, although section 1988 mandates reference to state law when choosing a statute of limitations in a civil rights action, "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" dictate that the same statute of limitations be applied to all section 1983 actions in a given state. 471 U.S. at 275, 105 S.Ct. at 1947. These same interests are implicated when the choice is whether to apply one statute of limitation to a section 1983 claim and another statute to a section 1981 claim, particularly since both types of claims are often brought together in a single action. *See Goodman v. Lukens Steel Corp.*, 777 F.2d 113, 120 (3d Cir. 1985) ("Application of Pennsylvania's six year statute of limitations where the same claim [as is brought under section 1983] is brought under § 1981 would lead to a bizarre result."), *aff'd*, ____ U.S. ____, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987); *accord Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d

1500, 1503 n. 2 (11th Cir. 1986) (dictum) ("The same single limitations period should apply to § 1981 claims [as applies to § 1983 claims]."). Applying a single limitations period to section 1981 and section 1983 claims should make it easier for civil rights plaintiffs in Alabama to determine the dates by which they must assert their rights, and will prevent excessive litigation when both a private (section 1981) defendant and a government (section 1983) defendant are involved.

In view of our holding that the same state limitations period applies to both section 1981 and section 1983 claims, and in view of this court's earlier decision that section 1983 claims in Alabama are governed by the state's six-year personal injury statute, *see Jones v. Preuit & Mauldin*, 763 F.2d at 1256, Pullman's liability on the plaintiffs' section 1981 claims should be dated from October 19, 1965, six years prior to the filing of Swint's complaint. We recognize that this decision conflicts with earlier circuit decisions in *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 977 (5th Cir. 1980), *Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1263 (5th Cir. 1977), and *Buckner v. Goodyear Tire & Rubber Co.*, 476 F.2d 1287, 1287 (5th Cir. 1973) (adopting district court opinion in *Buckner v. Goodyear Tire & Rubber Co.*, 339 F.Supp. 1108 (N.D.Ala. 1972)), but it seems plain that the Supreme Court's decisions in *Wilson* and *Goodman* discussing the nature of section 1983 and section 1981 claims have rendered the analysis of those earlier cases obsolete. When the rationale of our earlier cases is substantially undercut, we are not only free but required to revisit the issue involved. *See Leach v. Pan American World Airways*, 842 F.2d 285, 286, 288 (11th Cir. 1988); *Gresham Park Community Organization v. Howell*, 652 F.2d 1227, 1234-35 (5th Cir. Unit B. Aug. 1981).

Pullman insists that, notwithstanding our holding today that the six-year statute applies, our decision should not be applied retroactively. In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the Supreme Court held that although retroactive application of judicial decisions was the general rule, three factors must be considered in determining whether it is proper in a given case: (1) whether the new limitations period has been occasioned by a change in the substantive

law the purpose of which would not be served by retroactivity; (2) whether the decision overruled clear past precedent on which the complaining party was entitled to rely; and (3) whether retroactive application would be inequitable. *Id.* at 106-07, 92 S.Ct. at 355. Pullman makes no argument with respect to the first factor, and admits, with respect to the second factor, that there was no clear precedent establishing a one-year limitation period in Alabama until *Buckner v. Goodyear Tire & Rubber Co.*, 476 F.2d at 1287, came out in 1973, over a year after the complaint was filed. The company argues, however, that the strength of the third *Huson* factor dictates what *Wilson* and *Goodman* not be applied retroactively. According to Pullman, it would be inequitable to apply the six-year statute given that the company has relied on the one-year statute for so long.

Under the circumstances, this argument is more than slightly ironic, and we reject it. First, it cannot be said that any aspect of the liability period—either the appropriate section 1981 statute of limitations or the relevant EEOC charge—was ever clarified, in those terms. Indeed, if anything regarding the period *was* made clear, it was that liability would be dated from sometime in 1966,[33] *see supra* part IIIA, only a few months after the October 19, 1965 date that the six-year statute would prescribe.

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33 Pullman makes a rather remarkable argument that the six-year statute cannot be applied, because the final pretrial order of September 19, 1983 "defined the scope of the action and anterior cut-off date in such a way as to be clearly inconsistent with a six-year statute," and the company prepared for trial on that basis. Brief of Defendant-Appellee Pullman-Standard at 61 (Sept. 8, 1987). Apart from the fact that the pretrial order to which Pullman refers did not address the *section 1981*, as opposed to the Title VII, statute of limitations, the order specifically instructed the company to prepare for a period dating from May 4, 1966, only six and one-half months short of the six years.

> The court has not decided the issue of which EEOC charge will control. Plaintiffs indicated that a charge was filed against the Company by one Spurgeon Seals, a member of the plaintiff class, on October 30, 1966, and that this charge was still pending on March 24, 1972. This court has not decided whether, absent amendment of the complaint to add Seals as a named plaintiff, his charge is fully transferable to the class. *But for the purposes of trial preparation, counsel should assume that the anterior cutoff date is 180 days prior to October 30, 1966.*

Second, assuming that the class definition was the direct court's indication of the appropriate section 1981 statute of limitations, it must be acknowledged that the definition read, "all black persons who are now or have (within one year *prior to the filing of any charges* under Title VII) been employed by defendant Company." Record, Vol. II, Tab 18 at 1 (emphasis added). The emphasized language reflects the district court's reliance on then-prevailing law holding that an EEOC charge tolled the applicable section 1981 statute of limitations. *See Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1378 (5th Cir. 1974) (decided March 27, 1974, two months before the district court's certification of the class); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n. 16 (5th Cir. 1971). That principle stood until the Supreme Court overruled it in *Johnson v. Railway Express, Inc.*, 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975). Thus, by arguing that we should apply Alabama's one-year statute of limitations *and* run it backward from the date of the complaint (rather than any EEOC charge, as the class certification suggests),[34] Pullman essentially urges us to apply only *Johnson*, the case in its *favor*, retroactively.

We decline to do so. Nothing definite was said about the liability period until the district court's 1986 decisions in *Swint IX* and *Swint X*, and neither side has demonstrated that it adopted a prejudicial position in reliance on the law prevailing prior to the *Johnson, Wilson,* and *Goodman* decisons. Indeed, when

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Record, Vol. II, Tab 96 at 1 (emphasis added). Perhaps this is why Pullman prepared exhibits relating not only to the 1969-1974 period, as its brief to this court suggests, but also to the 1964-1969 period, as the district court's order makes quite clear. *See Swint IX*, slip op. at 12. In any event, we find that Pullman did not meaningfully rely on any holding that the one-year statute was applicable.

34 It might be possible for the one-year statute to be applied but run backward from the Commissioner's *EEOC charge*, but Pullman appears to find any compromise on this score unacceptable. The discussion in its brief of the liability period is entitled, "The Court Below Correctly Held that All Liability for Periods Before July 17, 1969 Is Barred," and the company makes no mention of the fact that such a finding would require us to apply *Johnson v. Railway Express* retroactively.

Pullman filed its original answer, it pled the *six-year* statute.[35] When the law was clarified in 1973, dictating that the one-year statute should be applied, Pullman did not move for leave to amend its answer, and we find nothing else in the record to support the district court's apparent shift to the one-year statute in the pretrial class certification. Under most circumstances, this failure to replead would constitute a waiver of the shorter statute. *See, e.g., Paetz v. United States*, 795 F.2d 1533, 1536 (11th Cir. 1986); *Johnson-Manville Sales Corp. v. Mitchell Enterprises, Inc.*, 417 F.2d 129, 131 (5th Cir. 1969). We find it unnecessary, however, to go that far: suffice it to say that Pullman cannot claim for retroactivity purposes that it relied on the one-year statute.

In sum, the most equitable result is to apply retroactively *all* of the Supreme Court decisions pertaining to the liability period. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 335, 91 S.Ct. 795, 804, 28 L.Ed.2d 77 (1971) (interests of justice required that if counterdefendant's belated limitation defense was to be considered on its merits then counterclaimant's belated tolling argument must be dealt with as well.) Alabama's six-year statute of limitations should therefore be applied, and Pullman's potential liability should be dated from October 19, 1965, six years prior to the filing of Swint's complaint.[36]

IV. Departmental Assignments

Both Pullman and the plaintiffs have appealed certain aspects of the district court's decision that Pullman's depart-

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35 Pullman's answer read: "This defendant avers that the applicable statutes of limitations, Alabama Code Title 7, Sections 21 and 22, bar all claims made in the complaint, based on 42 U.S.C.A., Section 1981, arising more than *six years prior to the filing of complaint.*" Record, Vol. I, Tab 5 at 11 (emphasis added).

36 As indicated earlier, this ruling will apply only to the plaintiffs' claim of discrimination in initial assignments, as section 1981 requires proof of intentional discrimination, and the plaintiffs succeeded on their claim concerning the selection of supervisors only on a disparate impact, and thus Title VII, basis.

mental assignments of new hires were racially discriminatory. Pullman complains that the departmental assignments of new hires were never in the case as an independent issue, and, relatedly, that Louis Swint has no standing to represent the class on the issue because he was hired prior to the effective date of Title VII. The plaintiffs contend that the district court's finding that all discrimination in assignments ended by February 1969 was in error. We will address these arguments in turn.

A. Departmental Assignments as an Independent Issue

Pullman argues that the evidence pertaining to the departmental assignments of new hires came into the case only as circumstantial evidence that the nontransferable seniority system was intended to lock blacks into the departments with consistently lower JC-level jobs. In Pullman's view, this means that the plaintiffs are not entitled to relief on the assignments as a separate claim. We disagree.

The plaintiffs here alleged that they had worked for the company for years without the upward mobility of younger, less senior whites in other departments. They attributed this disparity primarily to the seniority system, reasoning that the departmental-only seniority had the effect of locking blacks into the low-ceiling and often segregated departments to which they were assigned on a discriminatory basis prior to the enactment of Title VII. When the suit was filed, the Supreme Court had not yet decided *Teamsters*, and the plaintiffs had to show only that a seniority system perpetuated past discrimination—here, the departmental assignments of new hires—to prove that it was not bona fide. In the course of trying to prove this, it became apparent that the discriminatory departmental assignments did not end with the enactment of Title VII. Pullman would have us ignore this fact because, as the case was first conceived, discriminatory departmental assignments were merely an element of the larger claim that the nontransferable seniority system was discriminatory and were not cast as an independent claim.

For two reasons, we decline to construe the plaintiffs' case so narrowly. First, precisely because the issue of departmental

assignments was at all points integral to the plaintiffs' attack on the seniority system, Pullman has had full opportunity throughout the proceeding to defend against the plaintiffs' claim that the assignments were discriminatory. The company does not claim otherwise. Second, a rule requiring plaintiffs to identify precisely what has caused the disparity in their treatment, and to suffer the loss of a claim should they be ignorant of hidden practices or mistaken in their emphasis, would lead us away from the truth, not toward it. In *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985), for example, the plaintiffs levied a general challenge to their employer's promotional practices. The employer responded by attacking the plaintiffs' statistics, asserting that the statistical pool the plaintiffs used included employees that had not yet made it onto a supervisory register. The district court dismissed the case primarily for this reason. *Id.* at 1521. On appeal, this court reversed, specifically holding that if the procedures used to qualify employees for the supervisory register were themselves discriminatory, *those* procedures could serve as the basis for relief. *See id.* at 1525. In discussing the way an employment discrimination action usually unfolds, the court found that it did not matter that the plaintiffs had not initially identified or challenged the procedures for reaching the register:

> [T]he purpose of Title VII is the removal of artificial, arbitrary and unnecessary barriers to employment which operate invidiously to discriminate on the basis of race or other impermissible classifications. . . . "This purpose is not well-served by a requirement that the plaintiff in every case pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified."

Id. at 1528 (quoting *Segar v. Smith*, 738 F.2d 1249, 1271 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985)). This case is analogous, in that the plaintiffs challenged the promotional system generally, and eventually it appeared that the disparity could have resulted as much from post-Title VII discrimination in assignments as from such discrimination prior to Title VII.

B. Swint's Representation of the Class on the Issue of Discriminatory Assignments

Pullman makes a related claim that Louis Swint and Willie Johnson are without standing to represent the class on the issue of departmental assignments of new hires because they were hired—and assigned to the Steel Erection Department—prior to July 2, 1965, the effective date of Title VII.[37] As in its argument concerning the dating of the liability period, Pullman relies on *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. at 147, 102 S.Ct. at 2364, 72 L.Ed.2d at 740, which requires that a named plaintiff have actually suffered a specific discriminatory practice if he is to represent the class in challenging that practice. The company defends its failure to challenge the named plaintiffs' standing earlier on the ground that *Falcon* constituted new law.

Pullman's argument that it had no basis on which to raise a standing claim earlier in the proceeding is persuasive. *Falcon* was new law; in fact, the decision reversed a ruling from this circuit. *See General Telephone Co. of the Southwest v. Falcon*, 626 F.2d 369, 375 (5th Cir.1980). Until *Falcon* was handed down, this circuit required only that a named plaintiff have suffered some form of discrimination on the same general basis—race, sex, religion—as the members of his class. *See, e.g., Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir.1969).

We are not persuaded, however, by Pullman's argument on the merits of its objection. As we noted earlier, *Falcon* was concerned with whether the commonality and typicality requirements of Fed.R.Civ.P. 23, governing class actions, were met. The case involved a named plaintiff complaining that he had been passed over for promotion and yet attempting to represent other Mexican-Americans who had not been hired. The Court found that Rule 23 standing could not be based solely on the

37 According to Pullman, Swint was hired on November 24, 1964, and Johnson was hired on January 12, 1956.

fact that the named plaintiff and the class members had both suffered discrimination based on their national origin. *See Falcon*, 457 U.S. at 158, 102 S.Ct. at 2371.

The Court acknowledged, however, that provided he is attacking the same discriminatory practice, a named plaintiff may have standing even though he is challenging its effects on an aspect of his employment different from that of some of the class members: an employee denied promotions because of a discriminatory test may represent persons who were not *hired* because of the same test. *See id.* at 159 n. 15, 102 S.Ct. at 2371 n. 15. The Court also stated that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion." *Id.* This court has since recognized these "exceptions to the general rule" and emphasized that they are exceptions precisely because they are circumstances in which the commonality and typicality requirements of Rule 23 are satisfied. *Griffin v. Dugger*, 823 F.2d 1476, 1487 (11th Cir.1987).

We believe that the commonality and typicality requirements of Rule 23 are satisfied by Swint's and Johnson's representation of the class on the issue of discriminatory assignments of new hires even though, because of the date they were hired, they personally may not recover on the assignments as an independent claim. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 406 n. 12, 97 S.Ct. 1891, 1898 n. 12, 52 L.Ed.2d 453 (1977) (where class claims have already been tried and initial certification was proper, class members' claims "[do] not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims"). As we noted earlier, *see supra* part III.A, Rule 23 requires that there be "questions of law or fact common to the class, [and that] the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(2), (3). From the start, the plaintiffs' basic complaint has been that Pullman prevented black employees from moving into its higher-level positions through a combination of discriminatory initial assignments and a departmental-

only seniority system. At the time of certification, this claim was legally identical to that of every other member of the class.

The fact that the plaintiffs' claim was ultimately broken up into two components—the assignments of new hires and the seniority system itself—because the *Teamsters* decision changed the law to require that a seniority system be analyzed separately and invalidated only if maintained with discriminatory intent, does not retroactively dictate that the district court abused its discretion in initially determining that the named plaintiffs' claim was typical of and involved questions of law and fact common to the class members' claims. *Cf. Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.) ("To determine [in evaluating commonality] what legal claims plaintiffs allege, a judge must look not to defendant's interrogatories but to plaintiffs' complaint."), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). Nor did this fact require the district court to decertify the class on Pullman's motion. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d at 1557 ("Rule 23 does not require that all the questions of law and fact raised by the dispute be common"); *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir.1985) ("The similarity of the legal theories shared by the plaintiffs and the class at large is so strong as to override whatever factual differences might exist"). The same injury—being locked into Pullman's lower-paying jobs—was under attack by both the named plaintiffs and the class members, and the only real question was whether it was the discrimination in assignments or the nature of the seniority system, or both, that prevented blacks from moving up the job ladder. The identity of the named plaintiffs' and class members' injuries, especially in light of the way the practices challenged were interrelated, was enough to satisfy the second *Falcon* exception. It indicated that there was a "general policy of discrimination . . . [that] *manifested itself* in hiring and promotion practices *in the same general fashion.*" *Falcon*, 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n. 15 (emphasis added).

C. The Date on Which Discriminatory Assignments Ceased

The plaintiffs argue that the district court erred in determining that Pullman no longer discriminated in assigning new hires after February 1969. The plaintiffs complain about what they deem the district court's vacillation on the issue: in *Swint I*, the court found that blacks had been kept out of some departments and relegated to others until as late as 1972; in *Swint III*, the court found that all discrimination in assignments ended by December 1966; and in *Swint IX*, the court found that the discrimination in assignments ended by February 1969. In the plaintiffs' view, it is not possible to find that certain departments included no blacks or no whites through 1971 and nonetheless conclude that discrimination ended in 1969. The plaintiffs also complain that Pullman's expert, on whom the district court expressly relied in *Swint IX*, used a cumulative figure for the 1969-1974 period and consequently admitted that he could not pinpoint the date on which discrimination in assignments ended. Finally, the plaintiffs contend that the district court relied too heavily on the 1969 OFCC agreement and conspicuously changed its opinion of the agreement between its decisions in *Swint I* and *Swint IX*.

We do not find the plaintiffs' arguments sufficient to disturb the district court's finding of fact with respect to the date on which Pullman stopped discrimination in assignments. The plaintiffs' contention that the district court's *Swint I* decision that discrimination continued until 1972 should be regarded as the law of the case is incorrect. As this court pointed out in *Robinson v. Parrish*, 720 F.2d at 1548, a district court need not rigidly adhere to its own rulings in an earlier stage of the case. *Id.* at 1550. To require that the district courts do so "would actually thwart the purpose of the [law of the case] doctrine" because it would prevent them from correcting errors that would otherwise warrant reversal on appeal and necessitate an entirely new trial. *Id.*

Although finding it of considerable force, we must also reject the plaintiffs' argument that the district court was substantively in error. In *Swint VII*, the Supreme Court made quite clear that the issue of discriminatory intent is a pure question of fact, sub-

ject, under Fed.R.Civ.P. 52(a), to review only for clear error. *Swint VII*, 456 U.S. at 287-88, 102 S.Ct. at 1789. Although a district court's finding of discrimination may be set aside if it rests on "an erroneous view of the law," *id.* at 287, 102 S.Ct. at 1789, it may not be set aside simply because the appellate court would decide the case differently on the same set of facts. *Id.* at 292, 102 S.Ct. at 1792. Because there was some evidence to support the district court's conclusion on the date discrimination in assignments ceased, and nothing in the opinion reflects an erroneous view of the law, the February 1969 date must stand.

It is true that five of Pullman's twenty-eight departments remained all white or all black after February 1969.[38] Were this the only evidence, the inference of discrimination would be very strong. We do not believe, however, that these numbers per se required the district court to find intentional discrimination. There was expert testimony that there was a significant difference between the assignment patterns of the last 1964-1969 and 1969-1974 periods, and although segregated departments were not completely eliminated by February 1969, four of the original nine segregated departments were integrated between 1965 and 1969. There was also evidence pertaining to the changes instituted by the January 1969 OFCC agreement: Pullman hired a black equal employment officer and began to encourage black employees to take advantage of company-financed vocational training. The district court was entitled to evaluate all of this evidence and assign certain items more weight than others.

In this connection, it makes no difference that Pullman's expert used cumulative data and admitted that he could not determine from the data the date on which assignments were no longer discriminatory. Unless flaws in statistical evidence are so egregious as to completely deprive the evidence of relevance, they go to the evidence's probative value, not to its admissibility. *Basemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 3009, 92 L.Ed.2d 315 (1986). The cumulative nature of the evi-

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38 USW's Air Brake and Inspection Departments remained all white until approximately 1971 and IAM's Die & Tool and Maintenance Departments remained all white until 1970. *See Swint I*, 11 F.E.P. at 953; *Swint VI*, 624 F.2d at 529. Conversely, no whites were assigned to USW's Die & Tool Department until 1971. *Swint I*, 11 F.E.P. at 953.

dence here may have rendered it of less value, but it cannot be said to have deprived it of all value. The evidence still served to show the direction in which assignments at the Bessemer plant were moving, and it could not have misled the district court precisely because of the very admission about which the plaintiffs complain: Pullman's expert was candid enough to admit that a particular ending date could not be pinpointed. Finally, the plaintiffs overstate the district court's reliance on the data. The court's opinion merely recites the conclusions of Pullman's expert, as well as the results of the court's own statistical model, and there is nothing to indicate that the court drew more than a generalized inference concerning the date from Pullman's data.[39]

Indeed, it seems rather clear to us—from its choice of *February* 1969—that the district court was not impressed with the January 1969 OFCC agreement and the testimony with regard to the changes the agreement wrought. We might not have been equally impressed, but we cannot say that the court was clearly erroneous for relying on the agreement. The plaintiffs' emphasis on the court's change in terminology respecting the agreement—stating in *Swint I* that the agreement "never became effective," 11 F.E.P. at 953 n. 32, and in *Swint IX* that it "was never termed official," slip op. at 13 n. 35—is misplaced. Even assuming that there is meaningful difference between the two phrases, which we very much doubt, both descriptions are based on the idea that the *union* did not accept

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39 The court wrote:

> The statistical evidence was generally divided into two time periods—1964 to 1969 and 1969 to 1974. As might be expected, the defendants' and plaintiffs' experts took different statistical approaches and arrived at somewhat conflicting conclusions. The court carefully studied the evidence presented by the parties and at trial presented to the parties for their comment another standard statistical model. Plaintiffs' expert acknowledged that a considerable change had taken place in the job class distribution by 1969. Defendants' expert found a statistical difference between the pre-1969 and post-1969 periods, with rough parity between the races in terms of job class assignments from 1969 forward. The alternative study prepared by the court indicated that post-1969 assignments were not racially tainted.

Swint IX, slip op. at 12-13.

the agreement, and in measuring Pullman's intent, the union's position is essentially irrelevant. The court could have concluded, based on the evidence, that the agreement and the programs put in place after its adoption by the company signalled Pullman's intent to change its discriminatory ways.

As should be clear, we affirm the district court's holdings with respect to Pullman's liability for discriminatory departmental assignments. Louis Swint has Rule 23 standing to continue his representation of the class on the issue, and Pullman is liable for classwide discrimination in assignments dating from October 19, 1965 through January 31, 1969.

V. The Nontransferable Seniority System

The plaintiffs appeal from the district court's decision that the nontransferable seniority system under which Pullman and USW operated in awarding promotions was a bona fide seniority system protected by section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1982). They argue that the district court erred in three respects: (1) in refusing to consider whether IAM's arguably racist motives and membership practices so tainted the system that Pullman cannot claim it was bona fide, even if USW can, (2) in failing to consider evidence that in 1965, after it appeared that all jobs at the plant would have to be opened to persons of all races, Pullman abandoned its earlier practice of offering on-the-job training in welding,[40] and (3) in excluding the testimony of over twenty black employees that Pullman discriminated in its job assignments *within* departments. Although, again, we might have weighed the evidence differently, we are unable to find that the district court's validation of the seniority system was clearly erroneous.[41]

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40 A Pullman official admitted that the practice changed because white welders at the Bessemer plant were unwilling to train black employees.

41 In *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n. 37 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979), this court held that the immunity created by section 703(h) extends not only to Title VII claims but to section 1981 claims as well. For that reason, the analysis that follows will not focus on the statute on which the plaintiffs base their challenge.

In evaluating the seniority system, our primary guide is *International Brotherhood of Teamsters v. United States*, 431 U.S. at 324, 97 S.Ct. at 1843, 52 L.Ed.2d at 396. In *Teamsters*, the Supreme Court held that, in light of section 703(h),[42] a seniority system of promotions cannot be invalidated solely on the basis that it perpetuates pre-Title VII discrimination. *See id.* at 353-54, 97 S.Ct. at 1864. The *Teamsters* Court also indicated that a seniority system cannot be invalidated solely because it perpetuates *post*-Title VII discrimination. Relying on the Court's concurrent decision in *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), Justice Stewart wrote:

> The legality of the seniority system insofar as it perpetuates post-Act discrimination nonetheless remains at issue in this case, in light of the injunction entered against the union. . . . Our decision today in *United Air Lines v. Evans*, . . . is largely dispositive of this issue. *Evans* holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee. Here, of course, the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time-barred. But this is simply *an additional reason not to hold the seniority system unlawful*,[43] since such a holding would in no way enlarge the relief to be awarded.

431 U.S. at 348 n. 30, 97 S.Ct. at 1861 n. 30 (footnote added) (emphasis added) (citations omitted).

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42 Section 703(h) provides, in relevant part, that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1982).

43 Because *Evans* dealt only with a situation where the employer's separate discriminatory acts in manipulation of the seniority system had not been the subject of a timely EEOC charge, we might not have read the opinion as covering situations where separate discriminatory acts *are* independently and properly in a case. The *Teamsters* passage, however, appears to equate the two situations.

As this passage demonstrates, the Court has drawn a definite distinction between challenges to a seniority system and challenges to other discriminatory conduct that in turn manipulates the system to the detriment of black employees. *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758, 96 S.Ct. 1251, 1257, 47 L.Ed.2d 444 (1975) ("The underlying legal wrong affecting [the class] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system."). For a plaintiff to prevail in a challenge to a seniority system, there must be a finding that the *system itself* was negotiated or maintained with an actual intent to discriminate.[44] *See Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1865; *see also Swint VII*, 456 U.S. at 289, 102 S.Ct. at 1790. Just as in an ordinary disparate treatment case, the burden of persuading the district court that a system is the product of an employer's discriminatory intent lies with the plaintiff. *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 82, 97 S.Ct. at 2276 ("[section] 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of a discriminatory purpose"); *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir.1980) ("There was no testimony indicating that the seniority system was instituted or maintained for racially discriminatory reasons."); *Fisher v. Proctor & Gamble Manufacturing Co.*, 613 F.2d at 542 ("there is no evidence in the record to show that the seniority system had 'its genesis in racial discrimination' or that it was negotiated and maintained for any 'illegal purpose' "). Insofar as the decision on the bona fides of a system turns on whether it was negotiated or maintained with discriminatory intent, it is a question of fact subject to review by this court only for clear error. *Swint VII*, 456 U.S. at 289-90, 102 S.Ct. at 1790-91.

The district court's treatment of Pullman's relationship with IAM was not clear error. The plaintiffs appear to be arguing a syllogism of sorts: (1) no one can seriously question that IAM

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44 Evidence that the seniority system has been manipulated can certainly be considered in evaluating an employer's intent with respect to the creation or maintenance of a seniority system, *Evans*, 431 U.S. at 558, 97 S.Ct. at 1889, but a system cannot be invalidated on such evidence standing alone. *Id.* at 560, 97 S.Ct. at 1890.

supported the concepts of departments in general and nontransferable seniority in order to keep its local all white; (2) Pullman entered into a collective bargaining agreement incorporating IAM's nontransferable seniority provisions; therefore, (3) Pullman adopted IAM's discriminatory motive. The problem with this argument is that the conclusion does not necessarily follow from the minor premise. Without independent evidence of Pullman's intent with respect to the seniority system, the plaintiffs are essentially urging us to impute IAM's motive to Pullman. In *Swint VII*, however, the Supreme Court expressly prohibited us from doing so:

> IAM's discriminatory motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in these cases. A discriminatory intent on the part of IAM, therefore, does not control the outcome of these cases. Neither does the fact, if true, that USW acquiesced in racially discriminatory conduct on the part of IAM. Such acquiescence is not the equivalent of a discriminatory purpose on the part of USW.

456 U.S. at 292, 102 S.Ct. at 1792.

By recognizing that the plaintiffs' argument is in essence one of presumption, we are not ignoring the plaintiffs' insistence that there was some independent evidence confirming Pullman's discriminatory intent. As noted above, the plaintiffs do cite evidence that Pullman did not assign any blacks to the IAM departments until 1970 and discontinued its practice of on-the-job training once the courts began requiring that all jobs at the plant be made available to black employees. Still, none of this evidence goes directly to Pullman's intent regarding the *system*. It tends to prove instead that Pullman engaged in a number of other, separate discriminatory practices, and, as noted above, the Supreme Court has required us to keep such distinctions in mind.

In short, we cannot say that the district court attributed insufficient significance to the plaintiffs' circumstantial evidence in the face of considerable direct evidence that the system

was not the product of discriminatory intent. The district court carefully analyzed the evidence presented, paying special attention to the four factors this court emphasized in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978): whether the system operates in a neutral fashion, discouraging all employees equally from transferring between departments; whether the system of seniority units is rational and in accord with industry practice; whether the system had its genesis in racial discrimination; and whether the system was negotiated and maintained free from any illegal purpose. The evidence revealed that whites as well as blacks often desired to transfer but were disinclined to do so because they too would lose their seniority. The evidence also showed that systems including nontransferable seniority between given units are quite common not only with manufacturers generally but with manufacturers of railroad cars.[45] Finally, although there was

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45 The plaintiffs argue that the law of the case doctrine prevented the district court from deciding that the nontransferable seniority system was rational. They cite this court's holding in *Swint VI*, 624 F.2d at 531, that there was no explanation for the segregated departments other than racial discrimination. They then point out that the union asked the Supreme Court on review of *Swint VI* to hold expressly that the departmental seniority system was rational, but the Court declined to do so. This sequence of events, the plaintiffs argue, left in place *Swint VI*'s holding that the system was irrational.

The plaintiffs' argument is without merit. The *Swint VI* holding with respect to the rationality of the system was one of the two with which the Supreme Court most found fault. In discussing how this court had not properly applied Rule 52(a), Justice White wrote:

> In particular, in regard to the second *James* factor—whether the departmental structure was rational or in line with industry practice—the Court of Appeals did not focus on the evidentiary basis for any particular finding of the District Court. It appeared to make an independent examination of the record and arrive at its own conclusion contrary to that of the District court.

Swint VII, 456 U.S. at 291 n. 21, 102 S.Ct. at 1791 n. 21. This indicates rather clearly that the *Swint VI* holding with respect to the system's rationality did not survive *Swint VII*, and it makes no difference that the Court rejected the union's request to hold the system rational. Indeed, that it is not an appellate court's role to enter fact-findings one way or the other was the Supreme Court's whole point.

considerable evidence that the system was adopted at a time when Pullman was openly discriminatory in other respects—i.e., the system did have its "genesis" in racial discrimination—there was nothing to suggest that Pullman acted with discriminatory intent in negotiating or maintaining nontransferable seniority. Indeed, there was evidence that Pullman would have preferred no seniority or the narrowest seniority possible so that it could have the greatest flexibility in filling vacant positions. There was also evidence that at a meeting of primarily black USW employees, a proposal to merge certain departments was voted down. Under these circumstances, the district court was entitled to accept Pullman's theory that the nontransferable seniority system was a compromise negotiated and maintained without discriminatory intent.[46] Having thus found that three of the four *James* factors went against a finding of discriminatory intent, the court was not clearly erroneous in concluding that the seniority system was bona fide.

The fact that the district court excluded the plaintiffs' evidence with respect to Pullman's allegedly discriminatory job assignments *within* departments does not change our conclusion. We agree with the plaintiffs that the proffered testimony would have served as circumstantial evidence that the system was maintained with discriminatory intent, but we cannot accept the plaintiffs' failure to introduce the evidence before the 1984 proceedings. The plaintiffs knew, as of 1977 and the *Teamsters* decision, that they would have to prove that the seniority system was intentionally discriminatory, and a post-*Teamsters* trial was held in early 1978 precisely for that purpose. It cannot be said that the plaintiffs simply discovered late in the proceedings that many of their number had been subjected to intradepartmental discrimination: Spurgeon Seals' November 1966 EEOC charge specifically complained that he

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46 We do not even touch upon much of the evidence USW cites with respect to the negotiation of the seniority system, such as the fact that blacks were represented on the negotiating committee and USW's history as a protector of civil rights, because the plaintiffs have recognized that the district court's finding with respect to USW's intent cannot be found clearly erroneous. *See* Brief for Plaintiffs-Appellants William B. Larkin, Louis Swint, *et al.* at 57.

had been passed over within his department in spite of his seniority. Additionally, the case was returned to the district court under a limited remand. The district court was instructed "to determine what impact the 'locking-in' of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the discriminatory motivation of IAM with respect to the institution of USW's seniority system," and to hold any other proceedings that "may be deemed necessary in view of our prior opinion and that of the United States Supreme Court." *Swint VIII*, 692 F.2d at 1031-32. Had it permitted the plaintiffs to embark on a new line of proof, the district court might well have violated the mandate rule. *See International Brotherhood of Boilermakers v. Barber*, 841 F.2d 1067, 1071 (11th Cir.1988). For these reasons, the district court did not abuse its discretion in excluding the testimony of the plaintiffs complaining of intradepartmental discrimination.[47]

In concluding our discussion of the seniority system, one thing should be made clear. By affirming the district court's ruling, and finding it conceivable that there could have been discrimination in initial assignments but not in maintaining the seniority system, we are not denying that the two issues are interrelated. Indeed, it is readily apparent that the discriminatory departmental assignments may have caused the seniority system to have a discriminatory impact on black employees' ability to move up the job ladder. As a result, during the Phase II proceedings, any member of the plaintiff class who suffered

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47 Nor did the district court err, as the plaintiffs urge in their brief, in failing to provide a remedy for Pullman's allegedly discriminatory intradepartmental assignments. The intradepartmental assignments were not a natural sub-issue of the plaintiffs' challenge to the seniority system, as were the initial departmental assignments we have recognized as a viable independent claim. *See supra* part IVA. And we find no indication whatsoever in the record that the plaintiffs ever made clear that they were asserting intradepartmental assignments as an independent claim. For example, in their 1978 brief to this court, the plaintiffs voiced no complaint that the district court overlooked their claim that intradepartmental assignments were discriminatory. In the face of this complete dearth of argument and evidence, the plaintiffs' claim that the references in pretrial orders and the like to "job" assignments prove that they were arguing this all along is simply not persuasive.

actionable discrimination in his initial assignment shall be entitled to a consideration of those jobs within the plant he might have gotten had he not been relegated to an all-black department or, in any event, kept out of the all-white departments. Once this determination has been made, corresponding "make-whole" relief should be awarded.

VI. The Selection of Supervisors

Pullman appeals from the district court's ruling that our holding in *Swint VI* that the company had discriminated in its selection of supervisors is the law of the case. Pullman's overall objection consists of several interrelated arguments. First, in the company's view, the *Swint VI* holding does not constitute the required finding of intentional discrimination. Second, the holding must be reconsidered because a number of later cases have changed the applicable law: (1) *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), makes clear that *Swint VI*'s references to the plaintiffs' "prima facie case" and the defendant's "rebuttal" were inappropriate; (2) *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), indicates that the plaintiffs' case was erroneously based on statistics that did not account for the qualifications required of Pullman supervisors; and (3) *Swint VII*, although dealing exclusively with the seniority system, reflects the Supreme Court's view that *Swint VI*, as a whole, was an improper exercise of appellate fact-finding. Third, the *Swint VI* holding cannot be the law of the case because this court relied in part on its concurrent holding that the seniority system at Pullman was not bona fide but intentionally discriminatory, a holding the Supreme court overturned. We reject these arguments and affirm the district court's ruling.

We must acknowledge from the outset that if they were substantively correct, Pullman's arguments might warrant a holding that the decision in *Swint VI* does not constitute the law of the case. Although the law of the case doctrine does dictate that a district court is bound by findings of fact and conclusions of

law made by the court of appeals in a prior appeal of the same case, *Robinson*, 690 F.2d at 872, the doctrine does not apply to issues that were not actually decided, either explicitly or implicitly. *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir.1984) ("the doctrine encompasses only those issues previously determined"); *Signal Oil & Gas Co.*, 654 F.2d at 1169 ("law of the case does not operate to bar subsequent consideration of matters that could have been, but were not, raised and resolved in the earlier proceeding"). Pullman's first argument, that the *Swint VI* treatment of the supervisors issue was not the requisite finding of intentional discrimination, is in essence a contention that *Swint VI* did not actually decide the supervisors issue. Likewise, Pullman's second argument, that Supreme Court cases decided after *Swint VI* require that the decision be reconsidered, appears to invoke a well-established exception to the law of the case doctrine. The doctrine does not bar reconsideration of a legal conclusion when controlling authority has since made a contrary decision of applicable law. *Wheeler*, 746 F.2d at 1440; *EEOC v. International Longshoremen's Ass'n*, 623 F.2d 1054, 1058 (5th Cir.1980), *cert. denied*, 451 U.S. 917, 101 S.Ct. 1997, 68 L.Ed.2d 310 (1981). Finally, Pullman's third argument, that *Swint VI* must be reconsidered because an aspect of the case on which this court relied was overturned by the Supreme Court, implicates yet another exception to the doctrine. A prior appellate decision may be disregarded if it was clearly erroneous and would work a manifest injustice. *Wheeler*, 746 F.2d at 1440; *United States v. McClain*, 593 F.2d 658, 664 (5th Cir.), *cert. denied*, 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979). We are unable to conclude, however, that Pullman's arguments are meritorious in substance.

It is true, for example, that *Swint IV* does not include a finding that Pullman intentionally discriminated in its selection of supervisors. That observation, however, is irrelevant: the plaintiffs here clearly proceeded on a disparate impact, rather than disparate treatment, theory and thus did not need to prove discriminatory intent. *See Connecticut v. Teal*, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32, 91 S.Ct. 849, 853-54, 28

L.Ed.2d 158 (1971); *see also Teamsters*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15 (discussing the distinction between disparate treatment and disparate impact cases). They were required, as an initial matter, to show only that a facially neutral practice was operating to exclude blacks from the supervisory positions in a significantly disproportionate fashion. *See Teal*, 457 U.S. at 446, 102 S.Ct. at 2530; *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977). The burden—not just of production but of persuasion—was then on Pullman to show that the practice challenged arose from a non-discriminatory business necessity. *See id.* at 329, 97 S.Ct. at 2727; *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854. The *Swint IV* court found simply that while the plaintiffs had met their burden, Pullman had offered no legally acceptable evidence that its subjective selection procedure was a business necessity. The district court's decision that Pullman was liable was properly based on this conclusion of law.

Pullman similarly confuses disparate treatment and disparate impact cases by arguing that *United States Postal Service. v. Aikens* requires a reconsideration of *Swint IV* holding. *Aikens* did hold, as Pullman notes, that once a case is fully tried, the concepts of plaintiffs' "prima facie case" and "rebuttal" should be discarded and the case evaluated to determine solely whether the plaintiffs proved intentional discrimination, 460 U.S. at 711, 715, 103 S.Ct. at 1482, and, as noted above, the *Swint IV* court did use the prima facie case and rebuttal terminology. *Aikens*, however, was a disparate treatment case requiring a showing of discriminatory intent, and its result was inextricably related to the Court's earlier attempts to make discriminatory intent susceptible of proof. The prima facie case-rebuttal-pretext framework for disparate treatment cases was developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1871, 36 L.Ed.2d 668 (1973), precisely because the Court realized that it would seldom be possible for plaintiffs to prove intentional discrimination directly and wanted to establish a series of shifting presumptions to ease that otherwise impossible burden. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 8, 101 S.Ct. 1089, 1094 n. 8, 67 L.Ed.2d 207 (1981); *see also Furnco Construction*

Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978). *Aikens* is thus wholly inapplicable to this disparate impact case,[48] where proof of discriminatory intent has never been necessary, and does not require that *Swint VI* be overturned simply because the opinion employed "prima facie case" and "rebuttal" terminology. Indeed, when one considers that a disparate-impact defendant actually carries a responsive burden of *persuasion*, unlike the rebuttal burden of *production* borne by the disparate-treatment defendant, it seems clear that the *Swint VI* court's references were, in a sense, misnomers intended to represent the parties' respective burdens.

We must also reject Pullman's argument that *Johnson v. Transportation Agency* reflects a change in the applicable law requiring us to reconsider and presumably overturn *Swint VI*. *Johnson* addressed the proof necessary to establish that a "manifest imbalance" in an employer's previous hiring or promotional policies justified its giving preference to women or minorities. In the court of its discussion, the Court noted that any statistics offered to prove such an imbalance must compare those actually hired or promoted with "those in the labor force who possess the relevant qualifications." 480 U.S. at ____, 107 S.Ct. at 1452. The Court also indicated that a plaintiff attempting to make out a prima facie case under Title VII is subject to the same requirement: "In order to make out a prima facie case

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48 Apparently anticipating that the plaintiffs, and perhaps this court, would distinguish *Aikens* as a disparate treatment case, Pullman argues that *Bazemore v. Friday*, 478 U.S. at 978, 106 S.Ct. at 3000, indicates that *Aikens'* holding is not limited to disparate treatment cases. *Bazemore*, however, was a "pattern and practice" case requiring the plaintiffs to " 'establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather the unusual practice.' " *Id.* at 3008 (quoting *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855). Because this burden is so similar to that imposed on the plaintiffs—and only on the plaintiffs—in a disparate treatment case, we do not believe *Bazemore* sufficiently akin to a disparate impact case to warrant any further extension of *Aikens*. We are especially comfortable with this conclusion having noted now-Chief Justice Rehnquist's opening footnote in *Aikens*: "We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standard that have disparate impact on minority applicants." 460 U.S. at 713 n. 1, 103 S.Ct. at 1481 n. 1.

on [a Title VII] claim, a plaintiff would be required to compare the percentage of black skilled workers in the . . . work force with the percentage of black skilled craft workers in the area labor market." *Johnson*, 480 U.S. at ____ n. 10, 107 S.Ct. at 1452 n. 10 (employing the facts from *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), in a hypothetical). Pullman argues from this observation that the plaintiffs here failed to show that there were any *qualified* blacks denied supervisory positions.

In our view, Pullman overstates the holding of *Johnson*. *Johnson*, and *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), upon which the *Johnson* Court relied, represent the Court's efforts to ensure that a Title VII plaintiff's statistical evidence is sufficiently narrow to raise a legitimate inference of discrimination. In other words, the cases set forth a relevance threshold that plaintiffs must satisfy if their case is to proceed further. Here, the plaintiffs compared the percentage of blacks in the Pullman workforce, all of whom were theoretically eligible for positions at least as temporary supervisors, with the percentage of blacks who were actually selected. There was no application process for the supervisory positions, so it was not possible for the plaintiffs to compare the percentage actually selected with the percentage of applicants. Additionally, even when, in the early stages of proceeding, Pullman was under what it would now deem the mistaken impression that it was the party responsible for identifying the qualifications necessary to become a supervisor, it put forth only generalized criteria[49]—ability to get along

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49 In its *Swint III* ruling that Pullman had not discriminated in the selection of supervisors, its last discussion of this issue, the district court did not specify a single "skill" that was needed to perform as a supervisor, despite its conclusion that "[i]t is clear from the evidence, if not from common sense, that special skills are needed by supervisors." 15 F.E.P. at 150. The court did not fault the plaintiffs' statistics for failing to account for the higher rate of black illiteracy and for the time blacks would need, due to previous discrimination, to develop "skills useful to supervisors," *id.* at 150 n. 15, whatever those were. Both of these observations, however, were in direct contravention of this court's holding in *Swint II*:

with other employees, knowledge of particular departments, and experience as a temporary foreman—that either would be impossible to incorporate into statistical proof or were themselves the result of discrimination.

Put simply, the plaintiffs used the narrowest statistics available, and we will not fault them for failing to account for "qualifications" that Pullman has, to this day, been unable to definitively articulate. To hold otherwise would be to read *Johnson* and *Hazelwood* as requiring plaintiffs to identify at the outset every criterion employed in a *subjective* selection process, a virtually impossible feat and one this court rejected in *Griffin v. Carlin*, 755 F.2d at 1528.[50] We do not believe that the Supreme Court intended such a radical result even in disparate treatment cases, much less in disparate impact cases. We are convinced that if the Court had intended to reassign the burden of production to Title VII plaintiffs, it would have said so. Pullman's final two contentions are based on the Supreme Court's holding in *Swint VII*. The company first argues that even if the Court did not directly review the *Swint VI* holding on the selection of supervisors, its opinion makes clear that all of *Swint VI*

> Since no minimum education requirement was proven legal under the strict guidelines of Title VII, the 'requirement' may not be used as a generalized inference to explain why blacks were not potential supervisors.
>
> . . . .
>
> . . . The [district court in *Swint I*] concluded that due to pre-'65 segregation of jobs, it has taken blacks some time to learn the range of job skills necessary to perform supervisory duties. This justification for not promoting blacks has been uniformly rejected by this court.

539 F.2d at 104.

50 We must emphasize that our holding is one of degree. We recognize fully that *Johnson* and *Hazelwood* require plaintiffs to recognize the basic qualifications for a position and exclude from their statistical pools persons who are obviously unqualified. We simply do not believe that plaintiffs are responsible for reading their employers' minds and culling out those persons who do not meet narrow, employer-specific "qualifications." Indeed, it is often those very qualifications that are causing a discriminatory impact; they should be subjected to the light of day and evaluated to see if they are truly necessary to the employer's business.

should be disregarded as improper fact-finding. For two reasons, we find this contention insufficient to require that the supervisors issue be reopened.

First, we are not free to reexamine an issue that has been finally decided and as to which certiorari has been denied unless there has been a clear change in the applicable law or our prior decision is found "manifestly erroneous." The holding in *Swint VII* presents neither of these situations. *Swint VII* presents neither of these situations. *Swint VII* did not *change* the law; it held simply that this court had not properly applied the clear error standard of Rule 52(a) to the seniority system issue. There was no suggestion in *Swint VII* that this court's treatment of the supervisors issue suffered from the same infirmity.

Second, even if it were appropriate to take a second look at *Swint VI*'s treatment of the issue, we would hold that Rule 52(a) was properly applied. Rule 52(a) requires us to refrain from reweighing evidence, but it does not prohibit us from correcting a district court's legal errors. *See Swint VII*, 456 U.S. at 291-92, 102 S.Ct. at 1791-92. *Swint VI*'s reversal of the district court on the supervisors issue more readily falls into this latter category. The court held that the district court had erred because (1) Pullman had not put forth "any evidence sufficient to show that the limitation upon which the defendant's business necessity defense rests is essential to the safety and efficiency of [its] operations," and (2) Pullman's rebuttal evidence—the slightly higher rate at which blacks refused promotions to supervisor and the pressure from other black employees that black supervisors suffered—could not be relied upon because the circumstances cited themselves resulted from the history of discriminatory practices at the Bessemer plant.[51] *Swint VI*, 624 F.2d at 536.

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51 In some circumstances, this might be considered a fact-finding in itself, but the district court essentially acknowledged that the black rejection rate was connected to the racial atmosphere at that plant. When the court decided to focus in *Swint III* on the rejection rate of 1971-1973, the court wrote: "Prior to 1971 the turndown rate by blacks was higher, and subse-

Both of these grounds reflect legal principles well established in this circuit. *See, e.g., Giles v. Ireland*, 742 F.2d 1366, 1381 (11th Cir. 1984) (judgment for defendant vacated where there was no showing that challenged policy was related to job performance); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1192-93 (5th Cir.) (experience requirement could not justify disparate impact where "[p]ast discriminatory practices have either prevented or discouraged many of [defendant's] employees from transferring to many lines of progression and from gaining the experience [the defendant] deems necessary in a supervisor"), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976); *Stevenson v. International Paper Co.*, 516 F.2d 103, 117 (5th Cir. 1975) (lack of experience in a particular line of progression does not justify disparity in appointments to supervisor where blacks were excluded from those lines of progression). Once the court addressed these legal errors, it was left only with the plaintiffs' showing that a remarkable disparity existed in the selection of supervisors.[52] Because this in turn left only one resolution of the issue, the court reversed. *See Swint VII*, 456 U.S. at 292, 102 S.Ct. at 1792 ("where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue"). We are thus unable to conclude that *Swint VI* was manifestly erroneous, and the district court properly regarded its holding on the supervisor issue as the law of the case.

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quent to 1972 the rate was probably lower. The 1971-73 figures should be [sic] reasonable approximation for the period as a whole." 15 F.E.P. at 152 n. 21. It is hard to imagine why the district court would be willing to speculate that blacks became more and more likely to accept foreman positions unless it had concluded that the rejection rate and the discriminatory practices at Pullman were related.

52 The court noted that in a workforce ranging from 45% to 50% black, and out of 143 salaried foremen positions, there was not a single black salaried foreman until 1966. In 1970, out of 160 salaried positions, blacks held nine. Through the time of trial in 1974, there had never been a black foreman, temporary or salaried, in thirteen of Pullman's twenty-eight departments. From 1966 through the time of trial, only twelve blacks were selected to fill fifty-nine salaried foreman vacancies. *Swint VI*, 624 F.2d at 527-28.

That *Swint VII* reversed the court's holding on the seniority system does not change this conclusion. It is true that the court in *Swint VI* referred to the fact that "black employees were locked in the lower paying jobs and departments." 624 F.2d at 536. The context in which this reference was made, however, was in explaining why blacks had become sufficiently demoralized that they might refuse to serve as supervisors. The lock-in effect was not cited as affirmative evidence that Pullman's entirely subjective selection procedure had a disparate impact on black employees. Moreover, *Swint VII* did not reject the idea that blacks were locked into the lower paying jobs. It merely held, as we do today, that the seniority system *itself* was not intentionally discriminatory. Under these circumstances, we do not believe the reference to the lock-in effect—which, due to the discriminatory post-Act departmental assignments, was no doubt a reality at Pullman—renders the *Swint VI* holding on the selection of supervisors manifestly erroneous.

We affirm the district court's decision that Pullman's subjective procedures for selecting supervisors violated Title VII.

VII. The *Larkin* Appeal

The *Larkin* plaintiffs appeal from the district court's denial of their motion under Fed.R.Civ.P. 60(b)(6) to transform its dismissal with prejudice to a dismissal without prejudice. The plaintiffs argue that the *Larkin* court should have essentially reopened their case once it became apparent that the *Swint* court would not hold Pullman liable for any discrimination prior to July 17, 1969 and would not hear any evidence concerning discriminatory intradepartmental assignments. These rulings by the *Swint* court, the plaintiffs contend, render erroneous the *Larkin* court's 1976 decision that the *Larkin* plaintiffs were barred by res judicata.

We affirm the *Larkin* court's denial of the Rule 60(b)(6) motion. With respect to the liability period, our decision that Pullman should be held liable from October 19, 1965 for its discriminatory assignments of new hires, *see supra* part III.B, eliminates the *Larkin* plaintiffs' concern that two years of dis-

crimination against them will not be addressed. With respect to the issue of intradepartmental assignments, our ruling that the district court did not abuse its discretion in excluding that evidence, *see supra* part V, must be applied to the *Larkin* plaintiffs just as it is to those in *Swint*. The *Larkin* court dismissed the *Larkin* plaintiffs' case in 1976. From then until 1984, when they moved the court to reconsider their case, the *Larkin* plaintiffs were operating on the assumption that they were members of the *Swint* class. Yet at no time during that seven-year period did the *Swint* plaintiffs ever attempt to put on evidence, which presumably could have come straight from the *Larkin* plaintiffs, that Pullman was continuing its pre-1965, "white job"–"black job" practice of discriminatory intradepartmental assignments. No meaningful explanations has ever been offered to explain this omission. Under these circumstances, the *Larkin* plaintiffs cannot be heard to complain that their claim concerning intradepartmental promotions was unjustly eliminated. In short, it was not the *court* in *Larkin* that was under a mistaken impression; it was the plaintiffs, to the extent that they believed that the *Swint* plaintiffs would properly raise their claim.

VIII. Conclusion

The district court's judgment in *Larkin v. Pullman-Standard*, No. 84-7319, is affirmed. The court properly denied the *Larkin* plaintiffs' motion to amend or alter the judgment.

The district court's judgment in the appeal by Pullman-Standard, *Swint v. Pullman-Standard*, No. 87-7057, is affirmed. The plaintiffs proved that the subjective procedures for selecting supervisory personnel had a discriminatory impact on Pullman's black employees, and the district court did not abuse its discretion in ruling that Louis Swint and Willie Johnson had Rule 23 standing to represent the class on the departmental assignments claim.

The district court's judgment in the appeal on behalf of the *Swint* plaintiffs, *Swint v. Pullman-Standard*, No. 86-7886, is affirmed in part and reversed in part. The district court did not err in finding that the seniority system was not created or main-

tained with discriminatory intent or in finding that any discrimination in departmental assignments ended by February 1969. The district court did err, however, in determining that Pullman could not be liable for any discrimination occurring before July 17, 1969. Pullman should be held liable for any discrimination in departmental assignments, the plaintiffs' section 1981 claim, from October 19, 1965 until January 31, 1969, and for the discriminatory impact of the supervisory selection procedures, the plaintiffs' Title VII claim, from September 28, 1966 until August 16, 1974.

Accordingly, we remand No. 86-7886 to the district court for further proceedings consistent with this opinion. Phase II proceedings should be held to determine the relief due the plaintiffs on their departmental assignments and selection of supervisors claims.

AFFIRMED in part, REVERSED in part and REMANDED.

II. Other Opinions Rendered in the Case

SWINT I

U.S. District Court,

Northern District of Alabama

SWINT, *et al.* v. PULLMAN—STANDARD, Bessemer, Alabama, UNITED STEELWORKERS OF AMERICA LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and IAM, LOCAL LODGE 272, No. 71-955-S, September 13, 1974

U.W. Clemon (Adams, Baker & Clemon), Birmingham, Ala., and Jack Greenberg and Marilyn Holifield, New York, N.Y. for plaintiffs.

C.V. Stelzenmuller (Thomas, Taliaferro, Forman, Burr & Murray), Birmingham, Ala., for defendant employer.

John C. Falkenberry (Cooper, Mitch & Crawford), Birmingham, Ala., for Steelworker defendants.

SAM C. POINTER, Jr., District Judge:—This case involves individual and class claims of racial discrimination in certain employment practices of Pullman at its Bessemer, Alabama, Plant. In part, the claims are also made against the United Steelworkers of America, AFL-CIO, and it Local 1466. Individual notice to class members was not required by the court;[1] but company bulletin boards were used to advise employees of

1 All footnotes for this section appear at the end of this opinion, pp. 91a to 103a.

the pendency and nature of the litigation and to explain how they could make known to the parties evidence thought to have some bearing on the case. While pretrial conferences succeeded, with the agreement of counsel, in limiting the issues to five in number,[2] some sixteen days of trial were consumed in the presentation of evidence, in large part due to the leeway permitted in such cases for introduction of matters having potential circumstantial relevance.

Overview

Pullman-Standard, a division of Pullman, Inc., is the world's largest manufacturer of railway freight cars and parts. Operations at its Bessemer plant are geared to special orders, rather than the production of an inventory, and accordingly are conducted much like a custom steel fabricating shop, though on a larger scale.[3] This method of production, coupled with sporadic market demands from the railroad industry, results in frequent and dramatic fluctuations in the level of employment.[4] Since the early 1940's, most[5] of the production and maintenance workers at Bessemer have been represented by the United Steelworkers, which also holds representation status at Pullman-Standard's other three plants; and key provisions dealing with seniority rights are largely covered by local rules at the individual plants rather than by the company-wide triennial collective bargaining contracts.

The production and maintenance jobs at Bessemer, over a hundred in number,[6] are divided among 25 different departments of varying sizes.[7] Each job has a specified job class (JC) level, which determines its relative ranking in base pay in comparison to other jobs.[8] All but two departments, Janitors and Template, have more than one job classification; and most, but not all, clasifications will be worked by more than a single employee during peak employment periods. One such job (Welder) sometimes is worked by over 500 employees.

Under the local rules at Bessemer, seniority is measured by continuous service in a particular department and is exercised in competition with all other employees in that department, there being no lines of promotion or progression in any department. Seniority rosters are maintained by department; and departmental age is basically the sole criterion used to determine who is rolled back or laid-off in the event of reductions, and who is recalled or promoted (assuming ability to do the work) in the event of force increases or other vacancies, in the department. It is somewhat inappropriate to talk about "permanent jobs" at Bessemer, except perhaps with respect to the most senior employees in the department; for the constant fluctuations in job requirements and employment levels cause frequent movement of employees from one job to another. While the seniority rosters do indicate a job classification for each employee, these designations do not reflect his[9] permanent job, but rather constitute a recognition by the company that the employee has satisfactorily performed the job and is thereby protected under the collective bargaining agreement against rejection in favor of a junior employee on the factor of relative ability. The rosters are updated annually as of June 1st; and frequently only the highest job class which an employee has satisfactorily performed is shown for him.

From the study of payroll information for the 18 month period ending June 1974, it appears that 49.5% of the work force is black, a ratio which is comparable to that which existed in June 1965.[10] Understandably, plaintiffs do not assert that Pullman's initial hiring policies, as such are now or ever have been racially discriminatory.[11] Plaintiffs do, however, contend that assignment of new hires to the several departments was discriminatory, and continued so for several years following the

passage of Title VII. Further, the plaintiffs contend—with very little dispute[12]—that prior to June 1965 a number of the better jobs, including supervisory positions, were "white only" and a number of the lower-paying jobs were "black only."

In early 1965, spurred by an arbitration decision which opened up the then all-white Rivet Driver job to blacks,[13] the company began implementing a program to eliminate barriers to advancement by blacks and, in general, to conform to the impending requirements of Title VII where possible infractions were detected. Black buckers and welder helpers were given trials to ascertain their abilities as rivet drivers and welders, respectively. Beginning in June 1965 black employees were appointed as hourly foremen. A reporting system of hires and promotions was undertaken, as were efforts to recruit blacks for the more highly skilled positions. In early 1966 an agreement was made with the union to utilize seniority in the filling of temporary vacancies.[14] Negotiations were commenced in 1968 with the Department of Labor, which led in January 1969 to a conditional memorandum of understanding designed t o enhance opportunities for blacks.[15] Although this memorandum never became fully effective due to lack of union acceptance, Pullman through its Contract Compliance Officers—one black and one white—began encouraging black employees in certain "low ceiling" departments to transfer to other departments and monitoring the filling of temporary vacancies to assure a fair allotment to black employees. Black employees and their families were encouraged to participate in vocational education at the company's expense, a program that has been particulary significant in the training of black welders.[16]

In May 1972 Pullman entered into an agreement with the Department of Labor to serve as a corrective action program and to bring its employment practices into compliance with Ex-

ecutive Order 11246 as amended.[17] Of the many provisions in the twenty-five page agreement, the most significant to the issues in this case are those relating to inter-departmental transfers. Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments (Template, Powerhouse, Airbrake Pipe Shop, Inspection, and Plant Protection); and those hired before April 30, 1965, who had been assigned to four "low-ceiling" departments (Janitor, Die & Tool, Truck and Steel Miscellaneous) are given preference for vacancies arising in any of the departments.[18] These transfer rights are without limit as to time; and, when exercised, the employee vies for promotions in the new department using his total plant age.[19] For layoff and recall purposes, the employee is given at the time of the transfer the option either to take his plant age into the new department or to keep accruing seniority in his old department while building new age for such purposes in the new department. Retreat rights to the employee's prior job are provided should he fail to qualify for at least a JC 4 job or is disqualified for a promotion in the new department; and in such event the employee may have the right to go to another department rather than return to his original one.

For determination in this cause are four claims of class discrimination[20] and a claim of individual discrimination by two employees. The class issues are as follows:

> (1) Does the system of departmental seniority, even with the changes made under the agreement with the Department of Labor, perpetuate the effects of past discrimination in the assignment of black employees among the various departments?[21]

(2) Has there been discrimination in the assignment of work to persons having the same job title or in the assignment of jobs having the same JC level to the persons entitled to jobs of such JC level?

(3) Has there been discrimination in the promotion of persons to supervisory positions?

(4) Has there been discrimination in the failure to post publicly a list of changes in assignments?

One of the named plaintiffs, Louis Swint, and an intervenor-plaintiff, Clyde Humphrey, each claim that their discharges by the company in May 1971 and November 1972, respectively, were racially motivated or were in retaliation for their having earlier filed charges with the EEOC.[22]

I. Departmental Seniority

Notwithstanding the provisions of 42 U.S.C.A. § 2000e-2(h), exculpating "bona fide" seniority systems, it is clear that a departmental seniority system, "neutral" on its face, may yet be an impermissible instrument for discriminating, or perpetuating the effects of past discrimination, against employees because of race or color. This may result when there is, or has been, discrimination in the assignment of black employees among the departments by exclusively or disproportionately assigning white hires to higher-paying departments and black hires to lower-paying jobs. See, e.g., Franks v. Bowman Transportation Co., 495 F.2d 398, 8 FEP Cases 66 (CA 5 1974)[23]; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 7 FEP Cases 627 (CA 5 1974). Indeed, in other cases presented to it, this court has concluded that eradication of the effects of past discrimination required use of plant-wide seniority with transfer rights. See, e.g., U.S. v. United States Steel Corp., 371 F.Supp. 1045, 7 FEP Cases 322 (1973).

A departmental seniority system, however, is not *per se* violative of Title VII or § 1981. Rather, such a system is pernicious only if it is applied in a discriminatory manner[24] or if, as is more commonly the situation, it locks in the effects of present or past discrimination in departmental or job assignments.[25] For example, in the Johnson case, where seven of Goodyear's departments had been white-only and the other (Labor) had been black-only,[26] the use of departmental age tended to frustrate the therapeutic effects of a 1968 rule permitting interdepartmental transfers. Likewise, in the Franks case, black employees had been confined solely to a single division of a single department in jobs that "require the most menial work and bring the lowest pay."

A critical inquiry is to what extent—and with what effect—has there been discrimination in the assignment of employees to the various departments. The following chart, prepared by the court, reflects by department, ranked by job class ranges, the racial composition of the work force in June 1965, together with certain accumulating percentage figures.[27]

Five of the ddepartments—all but one being in the upper hall of the ranking—were all-white; and three—all on the bottom—were all-black. Pullman does not really deny that to perpetuate the effects of such assignments would be violative of Title VII. However, under its agreement with the Department of Labor, the black employees affected by such prior discrimination are given transfer rights with carry-forward of total plant seniority. It is not without significance that, of the assignments to the formerly all-white departments since the agreement, the only assignments to the Template, Powerhouse and Plant Protection departments have been of black employees and over half of the assignments to the Airbrake and Inspection departments have been of black employees.

Department/JC	#B	#W	%B	%W	%B	%W	%B	%W
			I.		II.		III.	
1. Template 2-20	0	9	0	0.77	—	—	—	—
2. Maint. 4-18	26	98	2.26	9.12	2.54	8.98	—	—
3. Forge 1-17	12	20	3.30	10.06	3.71	10.81	1.43	6.35
4. Power. 6-16	0	4	3.30	11.17	—	—	—	—
5. Inspec. 12-13	0	28	3.30	13.55	—	—	—	—
6. Punch & S 1-13	120	28	13.73	15.94	15.41	13.38	15.75	15.24
7. Mob. Cr. 5-12	3	2	13.99	16.11	15.71	13.56	16.11	15.87
8. Press 1-12	48	17	18.16	17.56	20.39	15.12	21.84	21.27
9. Rail. 7-11	8	10	18.85	18.41	21.17	16.03	22.79	24.44
10. Air Brake 6-11	0	27	18.85	20.72	—	—	—	—
11. S. Const. 1-11	124	18	29.63	22.25	33.27	17.69	37.59	30.16
12. Paint ST 1-11	91	84	37.53	29.41	42.15	25.39	48.45	56.83
13. S. Erec. 1-11	290	41	62.73	32.91	70.44	29.14	83.05	69.84
14. W. Erec. 1-11	65	35	68.37	35.89	76.78	32.35	90.81	80.95
15. W. Mill 1-11	7	17	68.98	37.34	77.46	33.91	91.65	86.35
16. Welding 1-10	161	678	82.97	95.14	93.17	96.05	—	—
17. Wheel & A 1-10	13	30	84.10	96.84	94.44	97.88	93.20	92.70
18. S. Misc. 2-9	86	2	91.57	97.01	—	—	—	—
19. S. Stores 2-9	45	10	95.48	97.87	98.83	98.80	98.57	95.87
20. P. Protec. 6-8	0	12	95.48	98.89	—	—	—	—
21. L. Stores 3-8	5	7	95.92	99.49	99.32	99.44	99.16	98.10
22. M. Stores 3-8	7	6	96.52	100	100	100	100	
23. Truck 1-6	21	0	98.35	100	—	—	—	—
24. D & T 1-5	9	0	99.13	100	—	—	—	—
25. Janitor 1	10	0	100	100	—	—	—	—

Attention therefore should in this case be directed to the percentage column II, which portrays the distribution by race excluding those departments covered by the agreement; i.e., the eight one-race departments and the Steel Miscellaneous department. This reveals that, while only in five of the sixteen departments (Mobile Crane, Railroad, Paint and Shipping Track, Lumber Stores, and Miscellaneous Stores) was the racial composition of the department approximately equal to the ratio for the total of all such departments,[28] yet there was no pattern of favoritism to whites in the departmental assignments. Indeed, on balance, blacks as a group appeared to receive somewhat of an edge in such assignments.

Special consideration must be given to the significance of the data respecting composition of the Maintenance and Welding departments. A high proportion of the jobs in these two departments require special skills; and yet, as previously noted, the positions are not arranged in lines of progression through which one, by assignment to entry level positions, can acquire the necessary training and experience to qualify. Accordingly, those positions typically have been filled by "off-the-street" employment of persons already possessing requisite qualifications. Bare statistics showing only the racial composition of the employees in those departments do not—absent a study of the qualifications of the applicants or at least a showing of examples in which qualified blacks were not assigned to such departments—evidence discriminatory assignments thereto. There has been no such study of applicants, nor indeed has there been any showing that the company declined to assign a qualified black employee or applicant to either black employee or applicant to either of the departments. Accordingly, a more realistic picture of departmental distribution of employees by race insofar as pertinent to the issues in this case is given in percentage column III of the chart. With perhaps one excep-

tion—the Forge department—the conclusion must be drawn that black employees were not adversely affected by such disproportionate departmental assignments as existed at the Bessemer plant.

Even with the Forge department an uncritical acceptance of the data can be deceiving. For although in June 1965 there were 12 blacks and 20 whites on its departmental seniority roster, other evidence shows that there has not been discrimination against blacks in the assignment of personnel to this "good" department. Indeed, just three years earlier, blacks constituted 47% of the Forge department while representing less than 42% of the total plant work force. (See Px-21).

Of course changes in the racial composition of the departments occur over time due to new hires and assignments and terminations. A study of the company's assignments from 1965 to 1974 discloses an obvious effect by Pullman to "correct" the racial imbalances in the departments. Those departments which in 1965 had been predominantly of one race are, without exception, closer in 1973 to the racial ration for the plant as a whole; and those departments which had been exclusively of one race are, with one exception, no longer "segregated". While the Janitors department is reflect as all-black in 1973, it should be noted that during the 1965-73 period two whites had been assigned to it, but subsequently quit.[29] A chart prepared by the court (not reproduced in this opinion) similar to that for June 1965 reflects that in June 1973 38.24% of the black employees in the sixteen departments not covered by the agreement (and 26.-44% of the whites) were assigned to departments in the upper-half of departmental ranking; and approximately 5% of each racial group was assigned to the four "bottom" such departments.

A study based on seniority rosters suffers in that it does not, of course, show actual work forces at any particular period. The only source in the evidence for making such a study is a compilation (page 74 of DX-351) which reflects for all but the smallest departments the monthly averages for the period December 1972 to June 1974 of the actual number of persons, with racial percentages, who drew checks during the month. In the court's study of such data, put into a form similar to that shown in percentage column III of the June 1965 seniority study for those departments for which the information was available, it was found that 40% of the blacks drawing paychecks were in departments in the upper-half of the department rankings, as compared to 36% of the whites.

In support of their attack upon Pullman's departmental seniority system,[10] the plaintiffs have by a series of exhibits, PX-41 thru PX-50, asserted that 92% of the jobs were segregated, i.e., "white only" or "black only", in 1962, and that 49% of the jobs were segregated even in 1973. A major difficulty with this approach is that it accords the same statistical significance to a job classification held by a few employees as to one held by scores or hundreds. If the number of employees in particular classifications is taken into account, it appears that less then 7% of the 2,900-plus employees on the 1973 seniority roster held "white only" or "black only" classifications. Moreover, to be meaningful, the calculations should be adjusted so as not to treat as "segregated" those classifications (1) which are one-man jobs (and hence necessarily of only one race); (2) which in prior years have been held by employees of both races (by looking at the seniority lists from 1966 through 1973); or (3) which are held by both races in other departments (e.g., the hook-on classification in four departments was held in 1973 only by blacks, but the same job in two other departments

was held by both blacks and whites). If this adjustment is made, it appears that less than 3% of the employees held "segregated" classifications according to the 1973 seniority roster.

As to the putative effect of such segregation, only 9 blacks have "segregated" classifications below JC 8; and only 14 whites have "segregated" classifications above JC 13. Twelve of these whites have the classification of Electrician Motor Inspector (JC 16) while in the same department (Maintenance) there is a black employee with the classification of Electrician Wireman-Craft (JC 18), and the other 2 whites hold the classification of Powerhouse Operator, in which there have been no vacancies in over 20 years. If one disregards those "white-only" classifications where a black employee in the same department has held another classification of equal or greater JC level, it appears that only 14 whites in 1973 held "segregated, higher" classifications: 2 at the JC 7 level, 7 at the JC 8 level, 3 at the JC 10 level, and 2 at the JC 16 level. In the two higher classifications (JC 10 and 16), there have been no vacancies since 1965.

The difficulty with using seniority rosters, rather than actual work assignments, is even more pronounced in a study of job classifications than in one of the departental assignments. As previously indicated, the seniority rosters reflect the job classifications as to which the employee has demonstrated satisfactory performance so as not thereafter to be questioned as to "relative" ability, and frequently only the highest rated job as to which he has so demonstrated his ability is shown on the roster. Typically, an employee is considered as qualified—and during periods of force reductions will work—jobs in the department lower than that shown for him on the roster. Accordingly, for example, to treat only black employees as holding the classification in the maintenance department as

Oiler or Helper is somewhat misleading, since there are whites having higher rated classifications in the department who are considered as possessing such qualifications. Employees will also on occasion work jobs higher than the classification shown for them on the seniority rosters. Finally, the number of persons holding a given classification on the seniority rosters is not necessarily a reliable means for determining the actual number of persons who will be working that job even at times of high production; and, indeed, if one looks at the number of white employees who at high employment will actually be working a "segregated" job (as to which some vacancy has existed since 1965) which has a higher job class than those at which blacks are working in that department, only 3 whites will be so "favored", and they are at the JC 7 and JC 8 levels.

The foregoing analysis should not be understood as denying the existence of segregation of jobs in the past. Indeed, until mid-1965, such practices significantly discriminated against black employees; and the effects thereof lingered, with diminishing extent, over the following years. Rather, what it does indicate is that the changes which were then made — the opening up of jobs to blacks through permitting them actually to use their departmental seniority to obtain better jobs—are remedying" (rather than perpetuating) the effects of such past job discrimination. What little racial identification of job classifications can still be discerned is basically due to the time lag which is an inherent quality of "rightful place" remedies.

Supportive of the conclusion that the seniority system at Bessemer is not perpetuating the effects of prior discrimination are the earnings figures submitted into evidence. The average earnings for black employees in comparison to those of white employees has risen steadily, such that by 1973 the average total earnings for black employees was $7,031, or 96.-8% of the average total earnings for whites, $7,259. If one could eliminate from such calculations those whites holding high-paying jobs

due to craft status or pre-1965 incumbency, it is clear that earnings of blacks would be on a parity with, or somewhat above, those of comparable white employees. Moreover, though not capable of measurement, there are potential opportunities for further increases in relative earnings for blacks due to the transfer rights under the agreement from some of the lower paying departments and to some of the higher paying departments.

Deserving of special consideration are two rather narrow attacks made by the plaintiffs upon the departmental seniority system as altered by the agreement with the Department of Labor; namely, that the transfer rights under the agreement are inadequate for failing to provide "red-circling" and for limiting the privilege to persons employed before April 30, 1965. These contentions are not dependent upon establishing discrimination in assignments other than in the nine departments covered by the agreement, and, as implied earlier in the decision, the court does conclude that there was such discrimination regarding those departments (though not as regards the other sixteen departments).

"Red-circling" is, of course, a standard remedy in cases of past discrimination, frequently necessary "since otherwise employees could not afford to take *training* jobs paying lower wages;" Pettway v. Acipco 494 F.2d 211, 248 n. 99, 7 FEP Cases 1115, 1144 (CA5 1974); and this court has mandated its use in other Title VII cases. Where the job from which the employee transfers pays more than the new job and the new job is in a department where the top wage rate is greater than rates in the old department, the employee is "red-circled", i.e., paid at his old wage rate until he advances to a job paying more or voluntarily freezes at the new job.

The court concludes that under the particular circumstances of this case, however, red-circling is not appropriate respecting the nine transfer departments. Virtually all of the jobs in the transfer-out departments have lower JC levels than the lowest JC jobs in the transfer-in departments. More significantly perhaps, there are no lines of promotion or residency requirements to impede promotions in the new department; and the frequent fluctuations in employment levels at Bessemer create many opportunities for advancement in the new department, as well as obfuscate the meaning of an employee's "old wage rate". Nor, except in a very loose sense, are there "training" jobs in the new departments. Finally, it should be noted that, in the evidence presented to the court concerning turndowns or disinterest in transfers under the agreement, the key feature seemed to be confusion or apprehension concerning seniority carry-over and retreat rights,[12] and not the risk of possible diminished wage rates.

While tacitly admitting—as indeed they must—that in the last several years Pullman has abandoned any discrimination in making assignments to the nine departments covered by the agreement, the plaintiffs contend that this change was not made immediately on April 30, 1965. Plaintiffs assert that discrimination in assignments to such departments continued for a number of years thereafter; and that, accordingly, transfer rights accorded under the agreement should be extended to black employees hired prior to, for example, June 1, 1969. In the court's opinion the situation regarding each department should be given separate consideration.

The court has studied the yearly seniority rosters to ascertain the assignment practices of the company in the years following April 30, 1965, looking to those who "survived" in the department long enough to be listed on the seniority roster published

after their assignment. As to the formerly all-white departments: blacks did not make the Air Brake seniority list until the 1971-72 period, although 6 whites previously had been added to the list subsequent to June 1, 1965; no black made the Inspection department list until the 1970-71 period, although 7 whites previously had been added after June 1, 1965; a black employee made the Plant Protection list in 1967-68, but a white employee had been added in the prior year; in the Template and Powerhouse departments the first (and only) person added after June 1, 1965, has been a black employee. As to the formerly all-black departments: the first whites were added to the Truck department in 1968-69, and one black previously had been added after June 1, 1965; the first whites were added to Die & Tool in 1971-72, but 2 blacks previously had been assigned subsequent to June 1, 1965; the first white was assigned to the Janitors department in 1967-68, but two black employees previously had been added after June 1, 1965. Respecting the Steel Miscellaneous department, four of the first thirteen employees added were white.

The court concludes, largely on the basis of the foregoing statistics, that the company did not abandon racially discriminatory assignment practices regarding the Janitors and Plant Protection departments until June 1, 1967, regarding the Truck department until June 1, 1968, regarding the Inspection department until June 1, 1970, and regarding the Die and Tool and Air Brake departments until June 1, 1971. The court concludes that discriminatory assignments were not made after April 30, 1965, respecting the Template, Powerhouse and Steel Miscellaneous departments.

Based upon the foregoing conclusions, the defendants are directed (1) to expand'' the definition of the ''affected class'' as

contained in paragraph one of the agreement (the "transfer-out" group) to those black employees assigned to the Janitors department who were employed prior to June 1, 1967, assigned to the Truck department who were employed prior to June 1, 1968, or assigned to the Die & Tool department who were employeed prior to June 1, 1971; and (2) for purposes of "transfer-in" to the Plant Protection, Inspection and Air Brake departments under paragraph two of the agreement, to add[14] to the list of eligible black employees those who were employed prior to June 1, 1967, June 1, 1970, and June 1, 1971, respectively.

Other than to the limited extent indicated in the preceding paragraph, the plaintiffs' attacks upon the departmental seniority system (as altered by the agreement with the Department of Labor) are denied. With the exception of nine departments, the evidence does not indicate any past or present policy of racially discriminatory assignments. As to those nine departments infected by past discrimination in assignments, the effects thereof are not being perpetuated by the present system with its transfer rights (as partially modified by the court in the preceding paragraph). It is not without significance that the Steelworkers local, which was organized principally by blacks, and whose policies over the years have been shaped as much by blacks as by whites, has advocated departmental seniority and, indeed, within the past several years, has rejected by unanimous vote a company proposal to merge several of the departments. Finding no statutory violations, it is unnecessary for the court to deal with the company's rear-line defense of business necessity.

II. Work Within Same Job Class

With one exception to be discussed infra, management has the sole authority under the collective bargaining agreement to assign work among employees working in a given job class in a department.[15] For example, a rivet driver has no voice in the

decision whether he is to drive rivets on the roof, or on a "top corner," or along the side, etc. While his pay in any event is the same,[36] the individual riveter frequently as personal likes and dislikes about particular assignments. Likewise, the company can transfer, without regard to seniority, an employee from one JC 6 job to another JC 6 job in the same department, such "lateral" transfer being within the management prerogative provisions of the labor contract. Here again, a particular lateral assignment may be distasteful to the individual employee.

The plaintiffs claim that, in exercising this discretion, Pullman gives the more dsirable assignments to white employees and the less desirable ones to blacks. Certainly such a practice, if established, would be violative of the anti-discrimination statutes notwithstanding the provisions of the collective bargaining agreement.[37]

Neither the claim, nor its denial, is susceptible of proof by direct statistical means; and, in essence, the plaintiffs rely upon purported examples of such discriminatory assignments, coupled with evidence of other acts and practices indicative of bias against black workers by a predominantly white group of foremen.[38] In support of its denial, aside from noting that the burden of proof is upon the plaintiffs, the company has offered evidence to show that the differences in jobs are merely matters of individual preference, that best utilization of skills is the criterion for such decisions (and not racial considerations), and that, under the business necessity doctrine, employees cannot be given the right to choose their own particular work assignments.

It is clear from the evidence that many—perhaps most—employees believe that some work assignments are better or worse than others. It is clear that many black employees who have received, in their opinion, a "bad" assignment from a

white foreman, consider the situation one of racial prejudice. The court must, of course, examine for itself the reality of the labels so placed by the witnesses.[39]

Yet the evidence is also clear that there is no general agreement among the employees as to which are the better, or the worse, work assignments for their job classification. Some riveters considered roof work exceptionally dirty; another liked it because he could kneel and work in a downward position; some preferred positions where there was no "O.K." (Corrective) work, and others considered "top corner" work good although it involved "O.K." work. Some spray painters liked the elevator-like platforms to work from; others preferred the old scaffolding method; some thought stencilling better work, but a stenciller, musing about the fumes when cleaning stencils, though otherwise. Evidence about other work assignments has the same theme: in short, "the grass looks greener. . . ." The court cannot conclude from the evidence that in fact some particular work assignments are objectively better or worse than others, either from the characterizations given by the employees or from a consideration of the particular functions to be performed.

Indeed, the typical situation of assertedly racial discrimination as presented to the court involved the assignment of work as between two or more black employees. In a few instances, the complaint did relate to a white employee receiving a "better" assignment, or a black receiving a "worse" one; but the evidence also showed that on other occasions this "better" assignment was given to blacks and this "worse" one to whites. Significantly, the assignments being criticized by the witnesses had been made by white, black, and Spanish-surnamed foremen.

Testifying were a number of foremen, both white and black, including some who have since returned to the bargaining unit. Without exception, they attested to the fact that their assignment decisions had been based on their assessment of the relative skills and limitations of their crew, mindful of their responsibility to complete the assigned work properly and on schedule. For example, some welders cannot satisfactorily do certain types of welding at all. Racial considerations, according to the foremen, have not been involved so far as they are concerned or have observed. Foremen do tend to keep an employee on a particular job so long as he is doing satisfactory work and is not needed more on another position—this for the reason that the crew is more efficient when the men are accustomed to the particular details of their assignment—and they may listen to an employee's preference and, on occasion, honor that preference. Nevertheless, the foremen, both black and white, insist that assignments must be left to them rather than to a selection process by the individual workers, at least if that would be a frequent matter.[40]

The evidence taken as a whole is unconvincing that blacks are being discriminated against in the assignment of work.[41] The dissatisfaction with work assignments at Pullman is basically an employer-employee dispute, not a black-white problem. In part, this conclusion finds support in the fact that in the last collective bargaining negotiations the union had a proposal, similar to the relief being sought by plaintiffs under this issue of the case, for permitting employees to use seniority rights in the selection of work assignments throughout the plant. While such a proposal might be beneficial to black employees (as well as to whites), there is no violation of the anti-discrimination statutes from the failure of a company to accord to blacks all that they want or all that might be beneficial to them. The court's function is not that of master mediator for the benefit of black employees or

for white employees. One might as well come to the court for a mandate to raise wage levels at the plant, an action that no doubt would meet with favor from all black and white workers.

Indeed, it is not merely the plaintiffs and the union, but on a related issue the company as well, that would have this court fight their collective bargaining battles under the guise of remedying discrimination. The company's invitation relates to the one situation in the plant where employee selection of work assignments is permitted—the "sub-assembly" work in the Welding department. As a result of an arbitration proceeding some ten years ago, Pullman was forced to institute a system whereby welders can use their seniority to "sign-up" for certain sub-assembly work at the start of large orders. Opportunities for incentive bonuses are generally better for these jobs than for other welding work, in large part due to the smaller crews on sub-assembly work. Since the welders with the greatest departmental age are predominantly white, the company asks that the court abolish this sign-up procedure.[42]

However, since the court has found no racial discrimination in the assignment of personnel to the Welding department, there is no basis for invalidating[43] the departmental seniority arrangement for sub-assembly work, a facially neutral system which is "bona fide" and is not the result of an intention to discriminate because of race or color.[44] 42 U.S.C.A. § 2000(e)-2(h). That such a system may benefit one race more than another is, absent proof of other discrimination being perpetuated thereby, insufficient—one might as well contend that where white employees on the average have more company, plant, departmental, LOP and job age, no seniority system could be used, or that blacks would have to be given pre-employment credit. Cf. Franks v. Bowman Transportation Co., 495 F.2d 398, 8 FEP Cases 66 (CA5 1974). Here again, finding no statutory violation, the court must reject the company's invitation to adopt its unsuccessful collective bargaining position.

All attacks upon the practices regarding assignment of work within the same job class positions, whether made by plaintiffs, company, or union, are denied; and the parties are left instead to the collective bargaining forum.

III. Promotions to Foreman

Prior to June 1965 there were no black foremen. At the time of trial only approximately 10% of the salaried foremen were black. Only one black has become a "B" foreman. Several blacks have asked for foreman positions, yet not been selected. Selection of foremen is made by an all-white group of supervisors, without any objective standards or tests. This, in essence, is the basis[45] for plaintiffs' claim of discrimination respecting promotions[46] to supervisory positions; and it has obvious appeal.

The front line in the supervisory ranks is the hourly foreman, typically an employee promoted from the bargaining unit in the department to supervise a crew of his former co-workers. Supervising the work done under several houly foremen will by an "A" foreman, who is salaried. The next step is the "B" foreman, and above that comes the Department Head. Hourly foremen are frequently moved back and forth between their supervisory positions and work in the bargaining unit, there being concomitant changes in the needs for supervision as the level of employment in the department rises and falls.[47] The company attempts to limit the number of salaried positions to that which can be given reasonable job security, and selects a foreman from the ranks of successful hourly foremen.

The key to this issue lies in the analysis of Pullman's practices regarding promotion of hourly foreman, for that is the source for higher promotions. Since mid-1965, some 56 blacks—ap-

proximately one-third of the total number—have been appointed as hourly foremen; and the percentage would be higher if the first few years of the period were disregarded. While this is lower than the percentage of blacks in the total workforce, several factors must be taken into consideration. First, it appears that a greater proportion of black than white employees, particularly among those with more experience with the company, fall into the functionally illiterate or minimally literate classifications, and accordingly are less likely candidates for supervisory positions.[48] Secondly, a greater proportion of blacks than whites have turned down opportunities to become hourly foremen.[49] Additionally, due to pre-1965 segregation of jobs, it has taken some time for blacks to learn the range of job skills necessary in many cases to performance of supervisory duties. The statistical evidence, fairly considered, does not support any claim of discrimination since 1965 in making appointments of hourly foremen; and the few instances of individual passovers are likewise unpersuasive.[50]

Inasmuch as blacks constitute a minority—for the reasons indicated above—of group of persons who have served as hourly foremen, it is to be expected likewise that there would be a minority of blacks raised to salaried foremen's positions. Data reflects that approximately 20% of such promotions since mid-1965 have been of blacks, a percentage that is not really disproportionate to the composition of the source group when one takes into account the pre-1965 hourly foremen (all white) and the necessity of some lag time for demonstration of satisfactory performance as an hourly foreman. Thus, while for the 1965-68 period only 4 of the 35 such promotions were of black employees, by the 1971-74 period 8 of 20 were blacks, a ratio higher than the percentage of blacks in the source group. One black hourly foreman testified that when recently complaining that the hadn't been put on salary, he was told that the company was attempting to use a "one-for-one" promotional ratio to salaried positions where possible.[51]

Selection of foremen has been largely a matter of subjective evaluation[52] by an all-white group of supervisors,[53] a fact which provides a ready-made opportunity for discrimination and which in other cases has added weight to inferences of bias drawn from statistical evidence. E.g., Rowe v. General Motors Corp., 457 F. 2d 348, 4 FEP Cases 445 (CA5 1972). But the lack of objective criteria—and in the selection of supervisors it is difficult [54] to arrive at such criteria without at the same time running the risk of potentially unlawful testing or educational requirements—is not itself a statutory violation or, indeed, necessarily even evidence of such a violation. See, e.g., Pettway v. Acipco. 494 F.2d 211, 7 FEP Cases 1115 (CA5 1974) (remanding for a consideration of the effect, if any, of using subjective evaluation). In the case *sub judice*, the court concludes that the statistical evidence, properly evaluated, is not supportive of a claim of discrimination in supervisory appointments in recent years and that there is no evidence of blacks during this period having been passed over in favor of less qualified whites. It must, therefore, follow that the use of subjective judgment in selecting foremen likewise is not shown to be a discriminatory employment practice.

In summary, upon a consideration of the whole of the pertinent evidence—and not merely those parts highlighted by plaintiffs—, the conclusion must be reached that the claim of racial discrimination in promotion of employees to foremen positions has not been proved and is therefore to be denied.

IV. Posting of Assignments

To the outside observer, the exercise of seniority rights for promotion, roll-back, layoff or recall purposes would appear to be fraught with difficulties. There is no bidding procedure, or even posting, of vacancies; nor is there even after-the-fact

notification of changes in assignments. Pullman notes that it has always been this way, for the very good reason that daily changes in employment levels and in assignments makes a bidding procedure impossible and a posting of assignments unnecessarily burdensome. According to Pullman, the recent innovation of publicly posting its daily turn-over sheets (indicating hires, terminations, layoffs, and recalls) really is of little benefit to the employees, inasmuch as these sheets in the past have been given to, and monitored by, union officials. Counsel for plaintiffs contend that black employees are entitled to some better system of notification in order that they may take full advantage of their seniority rights.

The court, frankly, was astonished during pretrial conferences that such a system—or lack of a system—could work. During trial, however, it became apparent from the evidence that the company's contentions as to the impossibility of a bidding procedure and as to the lack of utility of public posting of daily assignments were not specious. More importantly it was clear from the testimony that the employees, white and black, found the "word-of-mouth" and "personal observation" approach satisfactory and workable. Critical to this case, it was clear from the evidence that the lack of formal procedures for notification neither discriminated, nor perpetuated the effects of any past discrimination, against blacks. It should be noted in this regard that at Pullman's Bessemer plant the union officials play a far more active role in monitoring and ferreting out violations of employees' seniority rights than this court has found at other plants, and that these union positions are shared rather evenly between blacks and whites.

The court has no doubt but that some better system of giving notification about assignments could be adopted for this plant—though it would have to be different from that found in typical collective bargaining agreements—and that such a system, though the present one meets with general satisfaction,

would be of benefit to the employees, both white and black. However, as indicated earlier in this opinion, the court's role is limited to providing remedies for violations of the anti-discrimination statutes, and otherwise not to interfering with the collective bargaining process. As an issue in this lawsuit, plaintiffs' claim regarding posting of notices and the like is due to be denied, leaving the matter for collective bargaining processes.

V. Discharges of Swint and Humphrey

Louis Swint and Clyde Humphrey, black employees in the Steel Erection department, were fired by Pullman in May 1971 and November 1972, respectively. Disappointed with the outcome of arbitration proceedings,[55] each attacks the company's action as discriminatory or retaliatory, each having filed a charge of racial discrimination with the EEOC[56] prior to discharge and Swint also having been active on the plant's Civil Rights Committee.

In each instance the principal reason assigned by the company for its action was that of insubordination; and, without recounting the extensive evidence here, it is clear that the company had good and ample reason for believing[57] them guilty of such conduct, as well as of other prior derelictions in employment. There can be no doubt but that such action by employees was deemed by the company as a dischargeable offense, whether coming from blacks or from whites; and the only real question is whether these were but labels—were but a subterfuge—to cover the real reasons for their discharges; namely, that they were black or that they had caused problems to the company through filing of EEOC charges or Swint's service on the Civil Rights Committee.[58]

There is not the slightest evidence anywhere in the record on which the court might indulge in the inference that they were

fired because they were black. Perhaps the most telling point is that Swint's insubordination was directed toward a black foreman and that, in Humphrey's case, another black employee, who had been jointly involved in a refusal to do assigned work, was given no punishment when he recanted and agreed to do the work. (Humphrey persisted in refusing to do the work, was therupon discharged, and was reinstated by the arbitrator on the basis there was not enough distinction between the conduct of the two to justify the widely disparate treatment by the company.)

Nor is there substance in the assertion that Pullman's actions were retaliatory for earlier EEOC charges. It does not appear that the persons making the decision to discharge them were even aware of the filing of the charges. These were not the only charges filed with the EEOC—there have been a number of them, virtually all, it may be noted, having been found to be without probable cause. The evidence discloses that a number of those who have made claims of racial discrimination have obtained, if anything, favored treatment thereafter from the company in the form of obtaining promotions, transfers, reassignments, etc., which they had requested. Examples include Henry Vann, Spurgeon Seals, Edgar Davis, Junior Wormley, Willie James Johnson (one of the two named plaintiffs in this case), and William C. Harris. With the sole exception of the claims of Swint and Humphrey, the evidence reveals no instance of an employee filing an EEOC charge or serving on the Civil Rights Committee and thereafter being subjected to any allegedly retaliatory action from the company. In the present case it is unlikely that either Swint or Humphrey would have remained with Pullman as long as they did unless the company had been "bending over backwards" on their behalf. Their claims are denied.

Conclusion

With the limited exception of expanding somewhat eligibility to transfer rights under the 1972 agreement respecting six departments, the various claims and items of relief sought by plaintiffs are due to be denied. While the defendants must be considered as the "prevailing parties", nevertheless, in the exercise of discretion, the court believes that attornes' fees and costs should not be awarded to them. It is quite possible that the presence of this litigation has played some therapeutic role in bringing about the 1972 agreement and the strides made at Pullman in fashioning its affirmative action plans for enhancement of opportunities for black employees. The exposure of employment practices at Pullman through this litigation has not been without some benefit to both the company and the union. In a case where counsel for the plaintiff class has displayed unusual ability, fairness, and industry, it would hardly be in the public interest not only for his firm to go without recompense for considerable time and expenses, but for his clients as well to be taxed with additional charges. Judgment will reflect that each party is to bear his or its own costs and expenses.

Judgment

In accordance with the findings and conclusions contained in the Memorandum of Opinion filed concurrently herewith, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Memorandum of Agreement of May 1972 between the Department of Labor and Pullman-Standard is declared to be binding upon the union defendants; but eligibility under the agreement for transfers from the Janitors, Truck, and Die & Tool (CIO) departments and for transfers to the Plant Protection, Inspection, and Air Brake & Pipe Shop departments shall be modified to include certain classes of employees as more fully specified in the Memorandum of Opinion. Liability, if any, for

back pay in favor of persons benefited by such change in eligibility respecting transfers from the Janitors, Truck, and Die & Tool departments is severed for subsequent proceedings, as may be necessary, in accordance with procedures specified in the Memorandum of Opinion; but there is no just reason for delay as to the other issues in the case and entry of final judgment as to all such other issues is expressly directed.

2. In all other respects the claims of plaintiffs and of the plaintiff class are denied and the action dismissed with prejudice.

3. Each party shall bear its own costs.

[1] The court concluded that the case was maintainable as a class action under Rule 23(b)(2) and that neither constitutional requirements nor Rule 23(c)(2) made individual notice mandatory under the circumstances. Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 9 FEP Cases 1302 (1974).

[2] One of the five issues, that involving posting requirements, was thought resolved in advance of trial, but the plaintiffs, believing that resolution inadequate, chose to present the issue at trial as permitted by the pretrial order.

[3] Orders may be for as few as 25 cars, or for several thousand.

[4] The number of workers in Steelworkers units at the Bessemer plant varies from over 2,800 at peak employment periods to less than 200 at the lowest levels. During 1973, which was not abnormal in this respect, on only three occasions was the employment level in one week approximately equal to that of the prior week. Indeed, a chart based upon monthly employment hours from early 1958 to mid-1974 reflects only a very few times that hours worked in one month have have been aproximately the same as in any of the two months preceding or following. Changes in the work force were occurring during the several weeks this case was tried.

[5] Millrights and certain employees in the Die and Tool Department are represented by the International Association of Machinists and Aerospace Workers, AFL-CIO. For the limited purpose that some of the relief sought by plaintiffs might entail possible modification of its contract with Pullman, the I.A.M. and its Local Lodge 372 were joined as defendants at the time of trial although not previously named in any charges before the EEOC or involved in the allegations of the pleadings in this case. Since the I.A.M. jobs are only indirectly involved in this litigation, such positions are not dealt with or included in the review of evidence or the findings in this opinion unless specifically noted.

[6] While the job classification manual lists some 250 jobs, many of these are not worked at Bessemer, and several of the classifications—particularly, laborer, cleanup, craneman, and hook-on—appear in a number of departments as separate listings. The plaintiffs identified 123 jobs from the June 1973 seniority rosters, but even this figure includes duplications where the same job appears in more than one department.

[7] According to data showing the average number of persons drawing paychecks by department over an 18 month period ending June 1974, over 50% of the employees work in the Welding and Steel Erection Departments and almost 77% work in those departments plus the next four largest (Paint & Shipping Track, Punch & Shear, Steel Construction, and Maintenance).

[8] For example, Cleanup man, JC 1, has the lowest non-incentive standard hourly wage ($3,635 as of October 1973), while Template Maker Craft, JC 20, has the highest such wage (15,399 as of October 1973). Piece-rate scales and production quotas are frequently of great significance in determining the actual earnings potential of a particular job.

[9] There are a score or so of female production and maintenance workers at Pullman, both white and black. Due to the predominance of male employees, however, the masculine gender for pronouns is used for convenience in this opinion.

[10] Actual work-hour figures for 1965 were not available; nor was the June 1, 1965, seniority list. However, by looking at the June 1964 seniority list (PX-2) and by taking account of the additions and deletions to that list representing hires and terminations during the year, it is possible to construct the functional equivalent of, the June 1965 list. This calculation reflects 1,151 blacks and 1,773 whites on the seniority list as of June 1, 1965. While the seniority list does not absolutely reflect actual employment at any particular time, it does bear a significant correlation therewith in a period of high employment, such as June 1965 (in excess of 2,350 average workers for the month, per page 35 of DX-351). It may be noted that the actual employment of blacks in the December 1972-June 1974 period, i.e., 49.5% exceeded slightly the percentage of blacks on the seniority lists for June 1972 and June 1973, i.e., 44% and 46%, respectively.

[11] That the percentage of black workers at Pullman is higher than the percentage of black population or work force in Jefferson County, or even in Bessemer, does not, however, indicate hiring bias in favor of blacks. While data has not been compiled to compare actual applications for employment with hiring at Pullman for the period, one can, by analyzing the seniority rosters from 1966 through 1973, determine that approximately 36% of the new hires during that period were black, a percentage which is compatible with work force and population data from the census. Presumably, the analysis of quits and discharges during 1971 (page 83 of DX 351), showing that during that year almost three times as many whites as blacks either quit or were discharged, would be typical for the entire period. One may speculate that relative job opportunities with other employers were better for whites than for blacks and that relatively more blacks than whites chose to accept recall to Pullman after layoffs.

[12] Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated, and remained so into the mid-60's, not by formal agreement to that effect, but under a custom and practice which the company condoned, if not approved.

[13] For a number of years the labor agreement has contained language requiring its provisions to be applied without discrimination, but prior to the McCoy arbitration decision in March 1965 this language had been without apparent significance.

[14] A temporary promotion results in some increase in compensation and, perhaps more significantly, is the principal avenue by which an employee can obtain recognition as capable of satisfactorily performing the job.

[15] The memorandum contained provisions similar to those later incorporated in the 1972 agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

[16] Over a hundred blacks have received welder training at company expense and become welders at Pullman (though many have since gone with other companies). Without denying the benefits such training has provided to blacks, plaintiffs do note that with respect to welder jobs, the company has instituted a requirement that before it will test a welder's competency the employee must now show either formal training or field experience with some other company. This new requirement, though not unreasonable standing by itself, might constitute a discriminatory practice since in prior years whites were able to get testing with only company experience. This potentially discriminatory requirement, however, is not challenged as one of the issues in this case, and really has nothing to do with such issues, e.g., departmental seniority, assignment of work in the same JC level.

[17] The union has never formally adopted the agreement, but in practice has accepted the terms thereof to the extent that it must be deemed bound thereby.

[18] Employees from the low-ceiling departments, if possessing minimal qualifications, can also obtain vacancies arising in the I.A.M. units. In such event, they take their plant age into such units for the purposes of layoff and recall and, when vying against other apprentices at the same level, for promotional purposes. Without formally concurring in the agreement, the I.A.M. has apparently accepted the provisions and implicitly agreed to be bound thereby.

[19] It was discovered during the trial that one employee so transferring into the Powerhouse department, Robert Johnson, is not credited on the seniority rosters with his plant age for promotional purposes and apparently has never been given his option regarding seniority for layoff and recall purposes. Due, however, to stability of employment in the department and lack of subsequent promotional opportunities in the department, it appears that this mistake has been error without injury.

[20] The class was defined as consisting of all black persons who at any time sebsequent to one year prior to the filing of any charges with the EEOC had been employed by Pullman (at its Bessemer plant) as production or maintenance workers in positions represented by the United Steelworkers. General notification to class members specified these as the issues in the case and stated the class prevailed on one or more of the four issues.

[21] In the pretrial order this issue was defined as subsuming the contentions on behalf of the class that the agreement with the Department of Labor was inadequate in the following respects: the transfer rights applied only to four departments; the agreement did not provide for "red circling"; only a single transfer was provided; and transfers to I.A.M. positions were not afforded. At conferences during the trial of the case it became apparent that plaintiffs also contended that the transfer rights should have been extended to black employees hired in the 1965-68 period, rather than being limited to pre-May 1965 employees. [*Caveat:* The description of the issues in this part of the opinion should be taken merely as defining the contentions and not, for example, as constituting a finding by the court that no provision is in fact made for transfers to the I.A.M. positions under the agreement Cf. fn. 18, supra.]

[22] Mr. Swint's claims are premised on 42 U.S.C.A. §§ 1981, 2000e-2(a)(1), and 2000e-3(a). while Mr. Humphrey's are grounded only upon 42 U.S.C.A. § 1981. The court has assumed *arguendo* without deciding, that Humphrey's claim of retaliation for filing EEOC charges can be posited under §1981 and that Swint's alternative claim of retaliation for his participation on a joint Civil Rights Committee is cognizable.

[23] The Franks case disposes of one contention made by plaintiffs' namely, that the agreement with the Department of Labor was deficient in providing a one-transfer-only. See, 495 F.2d at 417 n. 16, 8 FEP Cases at 69. Actually, the agreement *sub judice* does provide for additional transfer rights under certain conditions.

[24] There is no contention in the present case that the departmental seniority system at Bessemer is applied other than in a uniform manner regardless of race or color. Nor is there evidence that the rather limited number of inter-departmental transfers granted at Pullman have been other than in a fair and non-discriminatory manner.

[25] For example, in Pettway v. ACIPCO, 494 F.2d 211, 7 FEP Cases 1115 (CA5 1974), at the time of trial in 1971 there were some 81% of the black employees (as compared with 54% of the whites) assigned to the seven departments (excluding Personnel and those with under 15 employees) having the lowest average wage, while 37.6% of the whites (as compared with 7% of the blacks) were assigned to the five departments having the highest average wage. More significantly, jobs in those mixed departments had in 1962 been totally segregated (whites holding only the higher paying jobs and blacks only the lower paying ones); and, of the limited integration in jobs which occurred over the

next seven years (over 75% of the job classifications still were segregated in 1969), such was effected through the influx of whites into black jobs, without a "sign of movement of blacks into higher paying jobs". Only 25% of the job classifications were integrated in 1971 when the case was tried.

[26] At Goodyear the departments were totally segregated until 1962. The first assignment of a white employee to the labor department occurred in September 1965. Of the 80 blacks hired in 1965-70, over 40% were assigned to the labor department, while of the 149 whites hired in the same period less than 7% of them were so assigned. It was admitted that labor department jobs were the lowest paying in the plant.

[27] A ranking according to job class levels does not mean that each employee would so rank the departments in terms of desirability; but it does provide a rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job classworked. For the Welding department the court has disregarded the highest job, Welder-Craft (JC 16), using instead the next highest job class, this adjustment being made because the highest position offers such few opportunities considering the size of the department, i.e., less than 1% of the department jobs. This study is based upon seniority rosters in the absence of data showing actual distribution of the work force by departments; and the June 1, 1965, figures are derived from PX-2. See footnote 10, supra. Percentage column I is computed for all departments. For the purposes indicated in the test of the opinion, percentage column II disregards employees for the nine departments involved in the agreement with the Department of Labor and percentage. Column III further disregards the maintenance and Welding departments. (In analyzing the evidence the court constructed charts of the same format based upon the June 1973 seniority rosters and upon the December 1973-June 1974 average monthly employment data. While these charts are not reproduced in this opinion, some references are made to the results of such studies.)

[28] It should be noted that, absent a conscious effort to achieve racial balance in departments, the existence of disproportionate racial compositions in departments is to be expected. Even when the extent of variation from the mean is great, other factors—such as quit rates, composition of application group at time of hire, applicant preference for employment in departments where other family members or friends are assigned, etc.—must be considered before concluding that racial motivations were involved in making the assignments.

[29] The matter of personal choice cannot be wholly discounted when evaluating departmental statistics. It is clear from the evidence that the blacks in the Janitors department prefer it to most — and a few of them prefer it to all—departments. The actual earnings of employees in the Janitors department indicate that, due to greater stability of employment, it may indeed have greater earnings potential than employment in a number of other departments with higher JC positions.

[30] Actually, even if there were a demonstration of segregation in job classifications, this would have no causal connection with the departmental seniority system, but would be indicative of some other discriminatory practice. Presumably, these studies were offered by plaintiffs as circumstantial evidence of motive, intent, design, etc., on the issue of departmental seniority and the other issues in this case.

[31] While there is a dramatic improvement in the status of blacks between PX-61 and PX-55, showing job classes of persons by race on seniority rosters for 1964 and 1973, respectively, yet the time lag inherent in "rightful place" adjustments still leaves much room for further movement upward by blacks. For example, the 1973 study by plaintiffs showed that 19.9% of the whites held positions on the rosters above JC 10, as compared with only 12.2% of the blacks. As an illustration of the difficulty of using seniority rosters to evaluate job classifications, it may be noted that for May 8, 1973, the only date for which such information has been presented (DX-274), 10,8% of the whites (and 9.3% of the blacks) actually working on that date in non-craft jobs were in jobs above JC 10.

[32] From January 1969 to May 1972, there was confusion since the 1969 memorandum of understanding, for lack of union acceptance, never became effective. One of plaintiff's witnesses, Alfonso Cole, implied that he was deceived by the Contract Compliance Officers as to his rights under the May 1972 agreements; but the court, having heard all of them, is persuaded that any misunderstanding by Cole is the result of distortion on the receiving, rather than on the sending, end of such communication.

[33] It is possible, though unlikely, that one or more of the blacks not being added to the "affected class" provision would have a claim for back pay based on their not having previously been included in that provision. Questions of back pay were previously severed for subsequent trial as might be necessary. The defendants are directed to give immediate written notice to such persons of their possible entitlement to back pay; and they shall have thirty days from receipt of such

notice (or one year if personal notification cannot be effected) in which to file with the court a claim for such relief. Plaintiffs' counsel may represent such persons unless they choose to employ their own attorneys. Under the provisions of Rule 54(b) the court determines that there is not just reason for delay of the other issues in the case pending resolution of such back pay claims, if any, and expressly directs entry of judgments as to all issues excluding that relating to back pay for such persons.

[34] It is clear that the persons now being added to the "transfer in" groups under the agreeement have no claim for back-pay since the vacancies in the three departments to this point would not have been sufficient to give them, at the bottom of the eligible group, any tranfer rights. Accordingly, any claim for back pay on their behalf is denied.

[35] This assumes, of course, that the work asigned is within the normal range of duties of the position. Occasionally, there will be a claim that certain work has been assigned which is outside the scope of duties and in that event grievances under the contract can be, and have been, pursued. Plaintiffs' contentions in this case are directed to assignments of work which, but for asserted racial implications, would be within management's rights. It may be noted that the provision in the collective bargaining agreement prohibiting discriminatory application of its terms would probably be an overriding limitation on management's rights and be the basis for a grievance under the contract where racial discrimination were involved in the exercise of such powers. Such a possibility does not, of course, preclude an action under Title VII for the same conduct.

[36] Certain assignments in the Punch & Shear department may, due to differing piecerates, have some monetary conequences. Plaintiffs have candidly acknowledged, however, that such results are only of collateral signifcance and not at the core of their complaint.

[37] In view of the court's conclusions as to the claim it is unnecessary to determine an appropriate remedy. Defendant company notes that any compensatory relief would not be "back pay" but rather an award comparable to general compensatory damages for mental suffering, presumably a matter for jury determination. See Curtis v. Loether, ____ U.S. ____ (1974); Lynch v. Pan American World Airways, 475 F.2d 764, 6 FEP Cases 353 (CA5 1973).

[18] The tendered circumstantial evidence regarding prejudice by foreman is mixed and quite inconclusive. A few black witnesses gave accounts of having been subjected to purportedly abusive language, or the like, from a white foreman; but the paucity of such complaints in comparison to the astronomical number of possibilities over the years, together with the near-paranoiac, exaggerated descriptions by those who did have such complaints, leads the court to place little weight on such evidence. A review of the more than 2,800 grievances filed by white and black employees in the past eight years is hardly supportive of any inference as to discrimination against blacks. The picture is rather that of typical disputes between employees and their employer, with only a very few having even marginal racial overtones. While a greater percentage of blacks than whites have been discharged over the years, a study of the grievances related thereto indicates no unequal treatment by the company. From the testimony of witnesses, the court is convinced that, by and large, white foremen in the past several years when dealing with black workers (and, likewise, black foremen when dealing with white workers) have tended to "lean over backwards" to avoid possible criticism as to discrimination. Over 54% of the temporary promotions to bargaining unit jobs made by foremen in the December 1972 to June 1974 period were to black employees.

[19] "How many legs does a dog have if you call a tail a 'leg'?" "Only four," goes the epigram, "because what you call it doesn't change what it is." The wisdom so expressed is illustrated by one example—and there are others — from the evidence in the case *sub judice*. Edward Loftin testified that all—or, at the very least, almost all—of the many grievances he had filed against Pullman involved racial discrimination. The grievances—over fifteen of them—were then examined one by one. Not one appeared to have any substantial element of *racial* discrimination. A characteristic grievance was that some other black employee had received an assignment that by seniority Loftin claimed he should have gotten. As to one grievance, Loftin also filed a charge with the EEOC—it involved a 30 day suspension for refusing to obey the orders of his black foreman, and the principal complaint apparently was that he was not adequatley represented by his union since only two union officials were present during one of the grievance steps.

[40] The company's business necessity defense is persuasive on this claim; that is, if assignments were to be a matter of daily choice. It is not persuasive, however, as to more infrequent opportunities for individual selection, such as to the beginning of a substantial order. While there no doubt would be selections by an employee of work he

could not perform satisfactorily, this could be largely remedied, albeit with increased inconvenience and expense of additional grievances, by use of the "ability" factor in the seniority definition. The failure of the "business necessity" defense does not, of course, mean the establishment of a cause of action.

[41] The court is not so naive as to believe that in no instance has there ever been racial prejudice in an assignment by a foreman. No doubt there has been. But the court concludes that this would have been far from commonplace and uncharacteristic of the conditions of employment at Bessemer. Isolated acts of prejudice, particularly where deemed to exist more by assumptions as to human nature than by direct proof, would not justify the issuance of injunctive relief.

[42] Of course, the company would not want to expose itself to back-pay liability respecting such sign-ups. Its defense—that it was not at fault and, to the extent of its bargaining power, had attempted to eliminate the practice—very possibly would be successful in passing to the union ultimate liability for such back pay. See Guerra v. Manchester Terminal Corp., 498 F.2d 641, 8 FEP Cases 433 (CA5 1974).

[43] The plaintiffs' request that sub-assembly work should be awarded on the basis of plant age (rather than departmental age) must also be denied for lack of prior discrimination in assigning personnel to the Welding department.

[44] Instituted at a time when, due to job segregation, there were only white welders, the sub-assembly sign-up would only have had the effect of determining which whites would get the sub-assembly work andwhich would not. Prior direct discrimination can sometimes be determinative of lack of racial motivation as to other acts. See Taylor v. McKeithen, ____ F.2d ____ (CA5, Aug. 21, 1974; slip op. at pp. 7085-86).

[45] Plaintiffs also assert that black foremen generally are given responsibility only over predominantly black crews. In a sense this is true, for most of the black foremen are located in departments which are predominantly black. This, however, is a natural consequence of a system, such as at Pullman, where most of the foremen come up "through the ranks" of their departments rather than being hired from the outside; and, indeed, a relatively higher proportion of white foremen generally is found in those departments where there is a relatively higher percentage of which employees. The plaintiffs, for obvious reasons do not want a change in the basic in-plant approach to supervisory promotions. Moreover, it is clear that black foremen do exercise supervision over white employees and that at least two normally have supervision over predominantly white crews.

[46] Plaintiffs' attack is upon Pullman's practices regarding promotions of production and maintenance employees to foremen positions not upon its relatively few "outside" hires of managerial personnel. It should be noted that the Plant Manager at Bessemer is one who came up through the ranks.

[47] The employee continues to accumulate seniority in his departmental bargaining unit for two years after promotion to a supervisory position.

[48] This conclusion is reached upon a consideration of census information introduced, of evidence concerning particular employees, and of an analysis of Bessemer employment records conducted by defendant's outside statistician. According to the latter study, 13.3% of Pullman's black employees who had been hired before 1965 were functionally illiterate (as compared to 2.4% of the whites in such category). The court is not holding—nor has the company really contended—that some particular level of education could pass muster as a requirement for promotions to supervisory positions; but it is obvious from other evidence in the case that the lack of minimal education frequently would render such persons unable to perform their required duties and hence make them less likely candidates for such positions.

[49] Testimony revealed many instances of such turn-downs. According to company records, 30 blacks and 17 whites have refused appointments as hourly foremen since the mid-60's, while according to the statistician's study of the 1971-73 period 58.3% of the refusals of such promotions were by blacks. There are many reasons why an employee, white or black, might choose to reject a temporary promotion to foreman; but it is clear from the evidence that an additional problem for blacks considering acceptance of such positions (at least until the past couple of years) was the likelihood of derision as an "Uncle Tom" by some black co-workers.

[50] Basically, these situations involved disgruntlement when other black employees were picked for such promotions ahead of, or instead of, the witness. Alvester Braxton was not selected, according to his foreman, due to excessive absenteeism (shown to the court), lack of initiative in learning other jobs in the department, and an inability to accept responsibility due to a nervous condition. In Braxton's department other blacks have been made hourly foremen, and one a salaried forman. Another, Spurgeon Seals, was turned down because he didn't get along with the other men; and here also in the Paint department,

other blacks have been made foremen before and after the rejection of Seals. Another, a man named Wilson in the Punch & Shear department, was, subsequent to this first request, later made a foreman. The evidence has not shown a single example of a black indicating an interest in a foreman's job being passed over in favor of a white with less qualifications.

[51] If this were the policy—and the company asserts it has no such limitation on promotions of blacks—it would be above that requested as relief by the plaintiffs. In the particular department where this is reported to have been said, five of the last six permanent supervisory promotions have been of black employees.

[52] The selection procedure at Bessemer is not totally subjective. The company is committed under the agreement with the department of Labor to attempting to appoint as temporary foremen no smaller a percentage of blacks than the percentage of black employees in a given department. Moreover, selection of salaried foremen is based upon demonstrated abilities while serving as hourly foremen, and hence is an experientially-based decision, albeit by a presently all-white group.

[53] Actually, one black (a Contract Compliance Officer) at the present time makes significant input to the decision-making process. With blacks starting to move further up the supervisory ladder, in the not distant future the decisions on supervisory positions will likely cease being an all-white function.

[54] The only suggested alternative in the evidence, that by one of plaintiffs' witnesses, was that seniority should be followed in making appointments of foremen. An objective standard to be sure, but hardly an apt one.

" Swint's discharge was upheld by the arbitrator; Humphrey's resulted in reinstatement without back pay. Pullman raises two special defenses to Humphrey's claim in this case related to the arbitration proceedings; (1) that his claim here is time barred since, in view of Alexander v. Gardner-Denver Co., 415 U.S. 915, 7 FEP Cases 81 (1974) (allowing pursuit of statutory remedies independent of the grievance machinery), the period during which contractual remedies were being processed should not toll the statute of limitations; and (2) that, having accepted benefits under the arbitrator's award, he should not be allowed "a second bite at the apple". In support of the first point, Pullman cites Guy v. Robbins & Myers Inc., 8 FEP Cases 311 (W.D. Tenn., June 12, 1974; but this court concludes that the Fifth Circuit still approves the tolling concept, as evidenced analogously by its recent decision in Guerra v. Manchester Terminal Corp., 498 F.2d 641, 8 FEP Cases 433 (CA5 No. 73-1907, July 31, 1974). As to the second point, this court concludes there is no basis here for applying a doctrine of waiver of estoppel (since Humphrey is seeking backpay, which was not awarded in the arbitration decision) and that, indeed, Humphrey is not attempting to reap "any windfall or unjust enrichment from the overlapping remedies" under the statutes and the collective bargaining agreement. Cf. Guerra v. Manchester Terminal Corp., supra, slip opinion at p. 6470; footnote 14 in Alexander v. Garner-Denver Co., supra.

" In neither case did the EEOC find "probable cause."

" The court need not actually decide whether they in fact were guilty of insubordination; it is suficient for the company's defense if management with good reason thought they were so guilty and discharged them for that reason. As a matter of fact, this court—as did the arbitrators—would find they were guilty of insubordination.

" There is a suggestion that the real reason for the company's discharge of Swint was its suspicion that Swint had instigated a work-stoppage by others. Even if this were true and would not have been sustainable by evidence in the arbitration proceeding, such would not constitute a Title VII violation. See Balderas v. LaCasita Farms, 500 F.2d 195, 8 FEP Cases 686 (CA5, Aug. 30, 1974).

SWINT II

Swint v. Pullman-Standard

Louis Swint et al., Plaintiffs-Appellants,

v.

Pullman-Standard et al.,
Defendants-Appellees,

Clyde Humphrey, Intervenor.

No. 74-3726.

United States Court of Appeals,

Fifth Circuit.

Aug. 30, 1976.

U. W. Clemon, Birmingham, Ala., Marilyn Holifield, New York City, for plaintiffs-appellants.

John C. Falkenberry, Birmingham, Ala., Michael H. Gottesman, Washington, D. C., for U. S. Steelworkers, and others.

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1 All footnotes for this section appear at the end of this opinion, pp. 141a to 155a.

C. V. Stelzenmuller, Birmingham, Ala., Franklin B. Snyder, Chicago, Ill., for Pullman-Standard Inc.

Appeal from the United States District Court for The Northern District of Alabama.

Before COLEMAN, CLARK and GEE, Circuit Judges.

CLARK, Circuit Judge:

This Title VII case raises claims that the very substantial, good faith efforts of the employer and union working together to end racially segregated working practices still fall short of eliminating the present effects of past discrimination for many black workers. The central attack is on a continuation of departmental seniority. The district court after a full hearing prepared a detailed memorandum opinion reasoning that the steps taken constituted sufficient complaince with Title VII. Principally because that result was based on a prima facie case and other burden of proof concepts which did not fit this case, we vacate the judgment appealed from and reverse for further proceedings, including reconsideration of appropriate backpay and other relief.

I. FACTS[1]

Pullman-Standard, a division of Pullman, Inc., is the world's largest manufacturer of railway freight cars and parts. Operations at its Bessemer, Alabama plant are geared to special orders, rather than the production of an inventory, and accordingly are conducted much like a custom steel fabricating shop, though on a larger scale.[2] This method of production, coupled with sporadic market demands from the railroad industry, results in frequent and dramatic fluctuations in the level of employment.[3] Since the early 1940's, most[4] of the production and maintenance workers at Pullman-Standard's Bessemer

plant have been represented by the United Steelworkers, which also hold representation status at Pullman-Standard's other three plants; and key provisions dealing with seniority rights are largely covered by local rules at the individual plants rather than by the company-wide triennial collective bargaining contracts.

The production and maintenance jobs at Pullman-Standard, over a hundred in number,[5], are divided among 25 different United Steelworkers departments of varying sizes.[6] In addition to these departments there are two Machinist Union departments and an additional United Steelworkers department having only one employee. All assignments to departments are made by Pullman-Standard. Each job has a specified job class (JC) level, which determines its relative ranking in base pay in comparison to other jobs.[7] All but two departments, Janitors and Template, have more than one job classification; and most, but not all, classifications will be worked by more than a single employee during peak employment periods. One such job (Welder) sometimes is worked by over 500 employees.

Under the local rules at Pullman-Standard, seniority is measured by continuous service in a particular department and is exercised in competition with all other employees in that department, there being no lines of promotion or progression in any department. Seniority rosters are maintained by department; and departmental age is basically the sole criterion used to determine who is rolled back or laid-off in the event of reductions, and who is recalled or promoted (assuming ability to do the work) in the event of force increases or other vacancies, in the department. It is somewhat inappropriate to talk about "permanent jobs" at Pullman-Standard, except perhaps with respect to the most senior employees in the department; for the constant fluctuations in job requirements and employment levels cause frequent movement of employees from one job to another. While the seniority rosters do indicate a job

classificaton for each employee, these designations do not reflect his[8] permanent job, but rather constitute a recognition by the company that the employee has satisfactorily performed the job and is thereby protected under the collective bargaining agreement against rejection in favor of a junior employee on the factor of relative ability. The rosters are updated annually as of June 1st; and frequently only the highest job class which an employee has satisfactorily performed is shown for him.

From the study of payroll information for the 18-month period ending June 1974, it appears that 49.5% of the work force is black, a ratio which is comparable to that which existed in June 1965.[9] Understandably, plaintiffs, do not assert that Pullman's initial hiring policies, as such, are now or ever have been racially discriminatory.[10] Plaintiffs do, however, contend that assignment of new hires to the several departments was discriminatory, and continued so for several years following the passage of Title VII. Further, the plaintiffs contend that prior to June 1965 a number of the better jobs, including supervisory positions, were "white only" and a number of the lower-paying jobs were "black only." Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated, and remained so into the mid-60's, not by formal agreement to that effect, but under a custom and practice which the company condoned, if not approved.

In early 1965, spurred by an arbitration decision which opened up the then all-white Rivet Driver Job to blacks,[11] the company began implementing a program to eliminate barriers to advancement by blacks and, in general, to conform to the impending requirements of Title VII where possible infractions were detected. Black buckers and welder helpers were given trials to ascertain their abilities as rivet drivers and welders, respectively.

Beginning in June 1965 black employees were appointed as hourly foremen. A reporting system of hires and promotions was undertaken, as were efforts to recruit blacks for the more highly skilled positions. In early 1966, an agreement was made with the union to utilize seniority in the filling of temporary vacancies.[12] Negotiations were commenced in 1968 with the Department of Labor, Office of Federal Contract Compliance (OFCC), which led in January 1969 to a conditional memorandum of understanding (OFCC agreement) designed to enhance opportunities for blacks.[13] Although this memorandum never became fully effective due to lack of union acceptance, Pullman-Standard through its Contract Compliance Officers—one black and one white—began encouraging black employees in certain "low ceiling" departments to transfer to other departments and monitoring the filling of temporary vacancies to assure a fair allotment to black employees. Black employees and their families were encouraged to participate in vocational education at the company's expense, a program that has been particularly significant in the training of black welders.[14]

In May 1972, Pullman-Standard entered into an agreement with the Department of Labor to serve as a corrective action program and to bring its employment prctices into compliance with Executive Order 11246 as amended.[15] Of the many provisions in the 25-page OFCC agreement, the most significant to the issues in this case are those relating to interdepartmental transfers. Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments (Template, Powerhouse, Airbrake Pipe Shop, Inspection, and Plant Protection); and those hired before April 30, 1965, who had been assigned to four "low ceiling" departments (Janitor, Die & Tool, Truck and Steel Miscellaneous) are given preference for vacancies arising in any of the departments.[16] These transfer

rights are without limit as to time; and, when exercised, the employee vies for promotions in the new department using his total plant age. For layoff and recall purposes, the employee is given at the time of the transfer the option either to take his plant age into the new department or to keep accruing seniority in his old department while building new age for such purposes in the new department. Retreat rights to the employee's prior job are provided should he fail to qualify for at least a JC 4 job or is disqualified for a promotion in the new department; and in such event the employee may have the right to go to another department rather than return to his original one.

The trial court had before it for determination four claims of class discrimination[17] and claims of individual discrimination by two employees. The class issues were:

> (1) Does the system of departmental seniority, even with the changes made under the OFCC agreement, perpetuate the effects of past discrimination in the assignment of black employees among the various departments?[18]
>
> (2) Has there been discrimination in the assignment of work to persons having the same job title or in the assignment of jobs having the same JC level to the persons entitled to jobs of such JC level?
>
> (3) Has there been discrimination in the promotion of persons to supervisory positions?
>
> (4) Has there been discrimination in the failure to post publicly a list of changes in assignments?

One of the named plaintiffs, Louis Swint, and an intervenor-plaintiff, Clyde Humphrey, each claim that their discharges by the company in May 1971 and November 1972, respectively, were racially motivated or were in retaliation for their having earlier filed charges with the EEOC.[19]

II. DEPARTMENTAL SENIORITY

The district court upheld the use of departmental seniority at Pullman-Standard on the premise that this practice may only be found to have perpetuated the effects of past discrimination when there has been a showing of prior discrimination in the assignment of black employees among departments by exclusively or disproportionately assigning white hires to higher-paying departments and black hires to lower-paying ones. This general principle, though correct in the abstract, cannot be translated into an absolute requirement that a plaintiff prove economic harm before he has established a prima facie case of racial discrimination in hiring assignments. Because the effect of the district court's approach improperly placed that burden on plaintiffs in this action, it found no unremedied discriminatory hiring assignments. Its conclusion based on the assumption that the plaintiffs had not shown that they were assigned to less desirable departments must be reversed and the issue remanded to the district court for reconsideration and resolution in a manner not inconsistent with this opinion.[20]

The lower court concluded that: "With the exception of nine departments, the evidence does not indicate any past or present policy of racially discriminatory assignments." This conclusion primarily rested upon the district court's finding that although in 1965 only five departments had racial compositions approximately equal to the ratio for the total of all departments, "there was no pattern of favoritism to whites in the departmental assignments." At the heart of this finding is a chart constructed by the lower court which ranked each department according to job class range.[21] The chart reveals that a greater percentage of blacks than of whites were employed in 1965 in departments with higher job class ranges. Because the chart is crucial to the district court's approval of departmental seniority, we must carefully and completely analyze the attacks made on it by plaintiff.

A. Was the Chart Wrong?—The Clearly Erroneous Attack

Plaintiffs contend that the theory and use of the chart give an incomplete and misleading impression and that fact findings based on it are clearly erroneous. The chart is designed to show departmental desirability. It accumulates the percentages of blacks and whites in each department in three ways. Column I shows all Steelworker departments except Boilerhouse, Column II additionally excludes the nine departments affected by the OFCC agreement, Column III further takes away the maintenance and welding departments. The accuracy of such an accumulating percentage chart directly depends upon the accuracy of the departmental rankings. Plaintiffs argue that the ranking of departments in the chart is arbitrary and inaccurate for the following five reasons:

1) Departments were ranked by job class range.[22] Plaintiffs argue that the key factor, economic desirability, is much more a function of the number of employees who work in each job class than of a department's job class range. For example, the chart would rank a department with job class ranges 1-10 above a department with ranges 1-9; yet, a department with 100 workers in JC-1 and five workers in JC-10 is clearly not as desirable as a department with five workers in JC-1 and 100 in JC-9. Plaintiffs' propose that any charting of desirability should rank departments by median job classes.[23] Not surprisingly, plaintiffs' proposed charting shows that blacks were disproportionately assigned to less desirable departments. Pullman-Standard replies that medians are also inaccurate indicia unless substantiated by various statistical techniques (such as standard deviations) which have not been supplied in this instance.

2) The plaintiffs contend the court arbitrarily excluded higher, sparsely populated job classes in some departments. The

Welding Department has a JC-16 job class which has less than 1% of the department's employees; therefore, the court excluded JC-16 from the Welding Department's job class range. If the JC-16 job class were included in the Welding Department job class range, the department would rise from rank 16 to rank 4 on the chart. Since Welding is the largest department and one in which whites are disproportionately represented, the accumulated percentages would be changed significantly by this move. Plaintiffs argue that the Wood-Mill, Wood-Erection, Paint, and Steel Construction departments all have less than 1% of their employees working in the top job class; however, the 1% job classes are included in those departments' ranges. The last three departments are particularly important because they are disproportionately black departments which by across-the-board equal treatment would be shown to be less desirable than presently reflected by the chart. Pullman-Standard, however, logically argues that the special statistical treatment given the Welding Department is entirely justified because the JC-10 to JC-16 jump (from the highest job class listed to the unlisted 1% job class) is much greater than the jump in the four departments where 1% job classes were included. Also, Pullman-Standard contends Welding is by far the largest department and deserved the special consideration given by the court's Column III to ensure that it did not unfairly skew the chart.

3) Plaintiffs object to the exclusion from the chart of the Die & Tool IAM, Maintenance IAM, and Boilerhouse departments. Two of these departments are covered by the Machinists instead of the Steelworkers Union. Therefore, they do not have job class ranges and could not easily be assigned ranks on the chart. However, no attempt at even estimating relative rank was made by the court. Boilerhouse is a Steelworker's department whose only worker has always been a JC-10 white employee. Plaintiffs argue that these departments are mostly segregated and are higher paying; therefore, their exclusion directly affects the chart and the conclusions drawn from it.

4) Plaintiffs point to departments which have the same job class ranges. These departments are arbitrarily assigned a rank on the chart even though they are nominally equal. The most obvious example is right in the middle of the rankings where five departments with ranges of JC-1 to JC-11 are listed in order. These ar large departments which total 1/3 of all workers. Two of these departments are heavily black. One contains more blacks than any other department. The ranking of these departments among the five could affect conclusions drawn from the chart.

5) Plaintiffs assail the chart's accumulating percentage columns. Plaintiffs are especially concerned with Column III which provides the strongest support for the court's findings. The exclusion of Welding[24] and Maintenance was made because of special technical skills needed in some of the job classes in these two departments. But, nowhere in the opinion is there the kind of business necessity finding which would be essential to allow a special-needed-skill exclusion to keep these departments from being considered.[25] Also, there is no finding of the nature of these needed skills nor whether they are necessary only in the higher job classes. Finally, if the skills are only needed in the higher job classes, there is no finding as to whether they could be gained while working in the lower ones, either with or without additional special training.[26] The court also found that plaintiffs had failed to prove that blacks were qualified to enter either department. This, however, reflects an incorrect placement of the burden of proof. The question of absence of qualifications is relevant, but only *after* the determination that a pattern of discrimination has been shown; and then, the burden is on the defendant to show the absence of qualifications.[27]

Prior to the desegregation of the Welder job class in this department, whites were able to take a test (usually after having served as a welder's helper and learning the skill) without either

prior formal training or experience to determine whether the employee was qualified to be a welder. Since blacks have been allowed to become welders, the company has required that only those persons with either prior experience or formal training could take the qualifying test. Plaintiffs argued that this should be considered as a facially neutral requirement which in reality operates to perpetuate past discrimination. Since there is some question as to whether this final issue was squarely presented below and since its resolution would not control our decision, we pretermit its resolution.

The concept of plaintiffs' attack on the district court's conclusion that blacks were not disproportionately assigned to less desirable departments based on the chart's deficiencies is framed in terms of a clearly erroneous factual determination. It fails because the district court did not treat the chart as plaintiffs contend. The court made two factual findings relevant to this inquiry. First, the court found that the *chart shows* that blacks were not disproportionately assigned to less desirable departments. This factual finding is correct to a mathematical certainty. Second, the lower court found that the chart was a "rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job class worked." In other words, the district court recognized that the chart had problems. Its "rough index" conclusion also is not clearly erroneous. The reason plaintiffs' clearly erroneous attack miscarries is that they misread the court's ultimate legal conclusion as resting upon a factual finding that the chart was both accurate and not arbitrary.

Despite our holding that the district court did not make an erroneous factfinding in its direct references to the chart, it is clear that plaintiffs valid attacks on the structure of the chart as discussed in detail above do impugn the credibility of the court's ultimate conclusions based on departmental desirability.

B. Less Desirable Assignments—Prima Facie Case

Plaintiffs in successful Title VII cases have uniformly been able to establish that their assignments produced diminished wages.[28] When today's proof was ruled insufficient to demonstrate loss, a novel question was squarely presented. To resolve it requires resort to the statutory language and case analysis of legislative purpose. When this path of reasoning is followed it leads to the conclusion that a Title VII plaintiff does not have to show economic loss to prove discrimination.

The district court concluded that plaintiffs' failure to show that class-wide economic harm resulted from the departmental assignments made meant that no prima facie case had been established. This legal deduction is inconsonant with the Act and its interpretative cases. The Title VII gravamen of the complaint is that departmental seniority perpetuated past discrimination. The key for this case is whether there was past discrimination, *i.e.*, that Pullman-Standard discriminated on the basis of race in making assignments to departments. Going further and requiring plaintiffs to prove that past assignment practices produced lower pay checks is contrary to law and precedent. The district court relied on *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) and *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) for its conclusion that economic harm from departmental assignments must be part of plaintiffs' prima facie proof. This reliance is misplaced. These cases and our contemporary decision in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) are cases in which the plaintiffs had clearly demonstrated that the defendants had assigned them to lower paying positions. When we recognized that the proof of such lower pay confirmed the existence of proscribed discrimination we did not mandate this element as a part of the prima facie case proof every Title VII plaintiff must make.

Title VII contains neither requirement nor implication that economic harm must be shown before a class can be found to have made out a prima facie case of racially discriminatory job assignment. Indeed, the statutory prohibitions of the enactment are explicitly broader than economic harm.

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) and (2).

In the seminal departmental seniority case, *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va.1968), the court made the general observation that employees in the predominately black department were usually paid less than employees in the two predominately white departments. However, a comparison of the wage ranges in all three departments showed one white department offered more and one less pay than the predominately black department.[29]

Notwithstanding this wage range proof and the fact that *Quarles* was specifically requesting a transfer to a department with a lower range than the department in which he worked, the court found that past discriminatory departmental assignment

practices were perpetuated by departmental seniority. While *Quarles* does not explicitly hold that a prima facie case was made without showing economic harm, it necessarily ruled that prima facie case was proven even though wage or job class range showed the predominately black department was not the least desirable.

In *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) the appeals court reversed the trial court's refusal to find that a Title VII violation had been established. The district court had placed on plaintiffs the burden of proving that the Labor Department was the least desirable department, then held that the burden had not been met by proof which showed racially disproportionate assignments of blacks to the Labor Department despite the fact that many jobs in that department paid less than jobs in most of the plant's predominately white departments. The Eighth Circuit reversed this burden placement. In a footnote it declared that where departmental desirability might be relevant defendants must carry the burden of showing blacks had been assigned to a more or an equally desirable department. Speaking more broadly, the court relied on our decision in *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972) (Hayes II) to hold that it was more important for the court to assure discriminatorily assigned employees had the opportunity to bid for jobs denied them because of race than to determine subjective factors of departmental desirability. Although the appeals court's principal determination was that the subjective evidence relied on did not establish the department to be the plant's most desirable place to work, its opinion leaves no doubt that departmental desirability is not an essential part of a plaintiffs' prima facie proof in a case such as this.

In *Hayes II* this court reviewed a lower court's determination that a departmental transfer system cured all possible perpetuation of past discrimination. The plaintiff United States unques-

tionably had established a prima facie case of racially discriminatory departmental assignment and as part of that proof had shown general economic harm to the affected class. However, one substantial issue in *Hayes II* concerned the defendant's contention that justification for not including several departments in the group of departments affected class members could transfer into could be found in the fact that the wages in those departments were "generally lower" than the departments in which affected class members were presently employed. The court ordered that qualified blacks be given an opportunity to transfer into these economically less desirable departments because "the Civil Rights Act provides for a job notwithstanding its lower pay or other disadvantages." *Hayes II*, 456 F.2d at 118.

In *Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721, 723 (8th Cir. 1973), the Eighth Circuit concluded simply that "statistics which show segregated departments and job classifications establish a violation of Title VII." Absent a single statement regarding either objective or subjective economic desirability the court found a Title VII violation. The court expressed concern because the blacks had suffered "the indignities of segregation" and ordered complete relief including transfer rights and departmental merger. *Id* at 726. This case clearly indicates that economic harm is not a necessary element of a prima facie case.

The same district judge in *United States* v. *United States Steel*, 371 F.Supp. 1045 (N.D.Ala.1973), after finding that a prima facie case of racial discrimination had been made, presumed damages to a particular subclass for purposes of injunctive relief.[30] The judge then denied back pay in *U.S. Steel* because plaintiffs had not proven harm caused by discrimination.

The focus of our appellate reversal of this latter burden assignment in *U.S. Steel* was not on whether sufficient evidence

had been presented to establish a prima facie case of discrimination nor on the presumed damages for injunctive relief, but rather focused on the erroneous assignment to plaintiffs of the burden of presenting evidence sufficient to justify a backpay award to the class.

The backpay issue must of course face the causal relation between discrimination and proof of economic harm. We make reference to this prior action not only because of its presumption of damage from racially skewed assignments, but also because it held that economic harm was not even a required part of a backpay prima facie case unless the *defendant* had convincingly brought the issue into question.

A holding that plaintiffs here may be entitled to relief absent showing harm to their pocketbook is analogous to the situation which exists in Title VII *failure -to-hire* cases. Courts uniformly award class-wide relief without any showing that other jobs available in the community were less desirable than the jobs the defendant refused to make available.[31] Discriminatory-departmental-assignment Title VII cases are neither more nor less than failure-to-hire cases. The failure to hire here is a failure to hire into a particular department.[32] Just because the other job the plaintiff received when he was discriminatorily prevented from being hired into one department was in the same plant is not a sufficient reason for increasing the plaintiffs' prima facie burden of proof.

Title VII of the Civil Rights Act prohibits all forms of racial discrimination in all aspects of employment. The degree of discrimination practiced by an employer is unimportant under Title VII. Discriminations come in all sizes and all such discriminations are prohibited by the Act.

Rowe v. General Motors, 457 F.2d 348, 354 (5th Cir. 1972).

The plaintiffs in the instant case were found to have failed to establish a prima facie case, for both injunctive relief and

backpay purposes, because they did not show economic harm—*i.e.*, that they were disproportionately assigned to less desirable departments. *Quarles, N.L. Industries, Hayes II, Reed, U.S. Steel,* and *Rowe* all lead us to the conclusion, buttressed by the broad statutory language, that, at least for the purposes of injunctive relief, plaintiffs need not show that they were assigned discriminatorily to *less desirable* departments in order to prove a prima facie case of racial discrimination.

For purposes of backpay relief, *U.S. Steel* holds that economic harm is not required to be shown as an element of a prima facie case unless the defendant has shown "convincingly" by "statistically fair exhibits" that the class earned "at least as much as a plant-seniority comparable group of whites." The district court's desirability finding was based on a "rough index" chart which it used in "the absence of other more reliable data." As demonstrated above, the chart contained patent inaccuracies. It does not amount to a convincing showing by a statistically fair exhibit of earnings equality.[13] In addition, the chart did not even attempt to correlate seniority-comparable workers. In the instant case, therefore, the defendant's evidence did not "draw into substantial question the group's entitlement to [backpay]."[14]

Without attempting to lay down a rule for all cases, it was error to require plaintiffs to prove economic harm as an element of their prima facie case of racially discriminatory departmental assignment.[15]

C. Scope of the Prima Facie Inquiry on Remand

Since the district court was in error when it ruled that plaintiffs had failed in their proof the case must go back for further consideration. Errors apparent in prior procedures indicate that we should now define the prima facie inquiry to eliminate the

likelihood they would recur on the reconsideration we now mandate. It would be inappropriate for this court to decide here, whether a prima facie showing was made. Not only do we not decide it, but also we do not intimate how it should have been resolved. This evidence-weighing process should be conducted by the district court in the first instance, especially since the question is so obviously a close one. We emphasize that despite our directions as to procedures and parameters on remand, we intimate no decision as to what the district court's ultimate conclusion should be.

Plaintiffs argue that previously the court limited its inquiry only to Steelworkers Union departments, exclusive of such departments as were covered by OFCC, plus Welding and Maintenance. Also, they contend that neither pre-'65 policies of discrimination nor statistics showing overall lower job class assignments to blacks were sufficiently considered. Finally, they claim undue weight was given to a 1972 yearly wage comparison. The trial court's opinion does not make it apparent that the weighing of this evidence ever actually took place (although several elements were discussed). The lack of proof of harm necessarily sidetracked the prima facie case conclusion.

The most important aspect of determining whether a prima facie case has been proven is to identify the proper scope of the evidentiary examination. The authorities speaking to this scope all conclude that the question should be whether the class has established a history of broad patterns of plant-wide racially discriminatory departmental assignments.[36]

> [T]he *class* must demonstrate a prima facie case of employment discrimination. Sometimes statistical evidence alone will suffice; on other occasions live testimony or additional exhibits may be necessary. At all events, however, the stress . . is upon demonstration of the defendant's broad employment policies and practices, the defendant's rebut-

tal and business necessity defenses, and the inferences which remain at the close of the evidence.

United States v. *United States Steel,* 520 F.2d 1043, 1053 (5th Cir. 1976); *citing, United States* v. *T.I.M.E.--D.C.,* 517 F.2d 299, 315-16 (5th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40, 53-55 (5th Cir. 1974); *United States* v. *Hayes International Corp. (Hayes II),* 456 F.2d 112, 120 (5th Cir. 1972).

During the class-wide inquiry, commonly referred to as phase one,[17] the court must also define the limits of the class actually entitled to relief and determine the relief necessary. Composing the makeup of the affected class is usually one the more difficult Title VII tasks.[18] The temptation to expedite the handling of a complicated Title VII case such as the one before us here urges a court to combine the determination of the prima facie case phase and the delineation of the affected class. These are separate problems and must be handled separately.[19] The combination of a prima facie case determination and an affected class limitation inevitably results in a narrowing of the broad prima facie case inquiry or broadening of the affected class delineation. Neither result is permissible. Title VII adjudicatory procedures are complex. In this maze of shifting of burdens and first-narrow-then-broad areas of trial court concern, it is particularly important that a court proceed only one step at a time.

The first inquiry should be whether a prima facie case has been shown. In the instant case that requires us initially to focus on whether a history existed at Pullman-Standard of broad patterns of plantwide racially discriminatory departmental assignments.

(1) *Disparate Department Assignments*

Although there are 28 departments at Pullman-Standard, the court's opinion and the chart from which it draws its major conclusions did not consider the two Machinists Union departments, the single-member Boilerhouse department, the departments covered by the OFCC agreement, and the Welding and Maintenance departments. In addition, the court found five of the remaining departments to be fairly statistically balanced. Thus, under its decisional framework, what was left was to decide whether a showing that nine departments are racially imbalanced makes out a prima facie case of racial departmental assignment. On remand, this entire analysis must be discarded. The appropriate evidentiary examination should focus on the *plant as a whole* to determine whether there have been racially discriminatory assignments.[40]

Many courts have found departmental assignments to be discriminatory where statistics showed absolute or almost absolute one-race departments.[41] The inference of discriminatory assignment in such complete exclusion or only token inclusion situations is much more direct than we have here.[42] But it is not necessary to show complete or substantially complete segregation by departments.[43] When the departments are racially mixed but simply do not represent the plant-wide balance, the inference of discriminatory assignment is much more difficult to draw. If the focus were only on the statistical racial disparity in nine departments, one could not conclude that a prima facie case existed. However, these statistics need not be viewed in this sort of vacuum. There exists a great deal of other evidence in the record which must also be entered onto the balance. It is this additional evidence which must be considered in the first instance by the trial court so that the balance can be struck according to the inferences that court chooses to draw.

(2) *OFCC Departments*

In its initial prima facie case inquir the court examined only those departments not covered by the OFCC agreement. The logic of its reasoning was sound, as far as it went—discriminatory assignments which are shown by these departments' statistics showing heavy segregation have been cured by OFCC.[44] But, the scope of the court's examination should have continued to be whether there had been past discriminatory racial assignments instead of stopping at answering whether the most glaring past discriminatory racial assignments were no longer frozen in by department seniority. The face that discriminatory assignments were made to these nine departments is clearly probative on the issue of whether plant-wide racially discriminatory departmental assignments existed. In this case where percentage discrepancies could indicate subtle discrimination or no discrimination in the remaining departments, the elimination of the unmistakable discrimination in these nine departments skews the analysis. An inference can be drawn from this proof that discrimination in departmental assignments stopped at these most segregated rosters. Another conclusion is that every department was involved. Whether either of these or some inbetween conclusion should be drawn will most probably depend on the other evidence presented and is for the trial court. But, the evidence must be assayed for this purpose to keep the process right.

(3) *Machinists Union Departments*

Similarly, the racial makeup of the Machinists Union department should also be considered in the prima facie balance. Pullman-Standard made assignments to these departments as it did the others. Although the court states in a footnote that the Machinists Union departments are included in the OFCC agreement, it appears that the departments were not included as all-white departments into which any blacks hired before the cutoff

date could transfer. Instead, the departments appear to be opened only to the extent that blacks in all-black departments could transfer into them. The actual effect of the OFCC plan on Machinists Union departments must be clarified on remand. Plaintiffs contend the Machinists Union departments were all-white and should have been included in the OFCC agreement as transfer-in departments for any black hired before the cutoff date, not just blacks who were assigned to all-black departments. Plaintiffs claim that these departments were still all-white in 1974. The district court made no finding regarding the racial composition of these departments in 1965 or 1974 and drew no inference from their composition. On remand it must do so. If blacks were excluded from these departments in the past, the departments must be included in the relief ordered by the court as departments to which any black hired before the cutoff date may transfer.

Moreover, the racial makeup of these departments in 1965, especially if they were all-white and high-paying departments, could be probative of plant-wide discriminatory assignment. The broad plant-wide scope of examination required during the prima facie case determination requires that this evidence be evaluated.

(4) *Welding and Maintenance Departments*

The court indicated that special skills are required for Welding and Maintenance departments and, therefore, they should not be considered as to whether there was plant-wide racially discriminatory departmental assignment. This conclusion would only be justified if the defendant could show that blacks were excluded from these departments because they lacked minimum qualifications and if such qualifications were justified by a business necessity.[45] Neither finding appears in the district court's opinion. Unless these findings can be made, the racial makeup of both departments must also be considered in determining whether a prima facie case has been shown.

(5) *Past Policies of Discrimination*

Plaintiffs contend that prior to 1965 blacks were discriminatorily assigned to departments and were discriminatorily assigned to lower paying job classes within each department. They point out that in 1964 98.4% of the blacks and only 15.8% of the whites were qualified to work in job classes 8 or below, while 79.7% of all whites were in job classes 10 or above. Since arbitration decisions in 1965 eliminated upward mobility barriers for blacks within each department, it would be logical to assume that in the 8 years between 1965 and 1973—if the disparity in job classes had truly resulted from the limitation of upward mobility within each department and not from discriminatory assignment to lower paying departments—that there would be substantial improvement in these figures. But, plaintiff's exhibits show that in 1973 74.1% of blacks still remained assigned to job classes lower than 8 while 80.7% of all whites were assigned to job classes over 10. If this evidence is not rebutted by substantial evidence that blacks were not qualified to progress within their departments, it indicates that blacks were assigned to less desirable departments and should be weighed in determining whether a prima facie case has been made.[46] The district court not only rejected consideration of the evidence, but also inexplicably discussed completely different figures from those shown in the record. If it is pertinent, this statistical discrepancy should be clarified on remand.

The district court recognized that until mid-1965 job classes were segregated by Pullman-Standard. Plaintiff states that 134 out of 148 job classes were all-white or all-black. The district court found that this job class segregation phenomenon has substantially dissipated and, therefore, did not give this past practice any weight. However, the prior history of discriminatory job class assignments is clearly relevant to the issue of whether the present discrepancies in departmental assignments were part and parcel of a broad scheme to treat

black and white workers differently. Historical policies of racial discrimination have often been used by other courts as indicia of plant-wide discriminatory conduct.[47] The weight to be given and the inferences to be drawn are for the trier of fact.

(6) *Average Yearly Wage*

The district court buttressed its conclusion that there was no perpetuation of discriminatory racial assignment at Pullman-Standard by referring to 1973 wage proof which showed that the gross yearly income of blacks from Pullman-Standard employment and unemployment benefits was 96.8% of that of whites from the same sources.[48] These statistics must be carefully examined. *United States* v. *United States Steel,* 520 F.2d 1043, 1054 (5th Cir. 1976), teaches that such wage parity is relevant only if groups with similar seniority are being statistically compared.[49] The figure used by the district court does not attempt only to compare groups of blacks and whites with relatively equal seniority. This is especially pertinent here because this record indicates that in general blacks have more seniority than whites at Pullman-Standard; if discrimination had not been perpetuated, blacks reasonably might be making more than whites. In addition, this yearly salary parity does not include two other extremely relevant factors: amount of overtime worked and number of weeks or hours worked. Because the figures did not consider seniority, overtime, and time worked, they were not a reliable indicia of even rough wage parity in 1973.[50] Their use by the district court was not proper.

(7) *Summary*

The district court must examine the evidence presented concerning the plant as a whole to determine whether a prima facie case of discriminatory departmental assignment has been made. If a prima facie case of past discrimination has been shown,[51] the court must then determine if it has been perpetuated. If such a determination can be made, then as a second and separate step

the court must limit the broad certified class to appropriate affected classes or subclasses and order necessary relief.

D. Perpetuation of Past Discrimination

The district court did not find any discrimination which could be perpetuated by the departmental seniority system in use at Pullman-Standard. Although it did find that the nine departments included in the OFCC plan were previously completely segregated, it determined that the OFCC provision allowing carryover departmental seniority for transferring discriminatees broke down any barriers for these blacks in reaching their rightful place in the plant. The approval of the OFCC plan (with slight expansions in effective dates) was a proper judicial recognition that if the departmental seniority system in effect at Pullman-Standard was left to function without modification, it would perpetuate past discrimination. The case law precedent is legion if not unanimous in holding that departmental seniority plans similar to that in use by defendant do perpetuate past discrimination.[52] If the trial court should find that the plaintiff has shown plant-wide discriminatory racial assignment has been perpetuated by the departmental seniority system, this barrier to transfer, which bars blacks from their rightful places in the plant, must fall.[53]

E. The Limitation of the Affected Class

Before the Court is able to order appropriate relief, however, it must define the plaintiff class affected by this discriminatory conduct. In a factual milieu such as that provided at Pullman-Standard, the two limiting factors on the definition of the affected class will be the number of departments covered and the hiring date upon which discriminatory departmental assignment ended. These two considerations—department and end date—will define the parameters of the affected class.

(1) *Affected Class Departmental Limitation*

The purpose of this second Title VII decisional step is to narrow the certified class only to those members most probably entitled to relief.[54] In performing this task the court should first delineate the elements of the plaintiffs' proof which were sufficient to make out a prima facie case of racially discriminatory departmental assignment. If these elements are clearly and convincingly inapplicable to a particular department, the department must be eliminated from membership in the affected class. In a completely segregated departmental situation, this limitation by departments may be easy.[55] In mixed department cases, however, the court may choose to order relief which applies plant-wide to all black employees hired before a certain date.[56]

Of course a defendant may also attack the inclusion of a particular department for reasons entirely separate from whether the elements of the plaintiffs' prima facie case are applicable. For example, proof that there have been specific requests by all black applicants not to be assigned to a particular department could well exclude a department from membership in the affected class. The burden of proving departmental exclusion in this latter type of situation would be on the defendant.

(2) *Affected Class Time Limitation*

If the court determines that plant-wide discriminatory assignment exists, it must limit the class to all blacks hired before the date when this historical discriminatory assignment process ceased.

Plaintiffs attack the dates used by the lower court when it expanded the time limitation on the departments under the OFCC agreement. The court used as the significant date the date when the first black or white was appointed to the all-white or -black department respectively. Token integration, however, does not signal the end of discrimination. These dates must be

reconsidered. It is improper to end affected class membership at a date upon which the first black or white was assigned to the department unless this date signifies the end of the discriminatory practices." Otherwise, the court must use a date which clearly signifies the end of a racially discriminatory departmental assignment.

Should the affected class be broadened on remand, the same analysis must be used whether the court chooses to limit the hiring date time factor of the affected class on a department-by-department or on a plant-wide basis.

III. APPROPRIATE RELIEF

If there ever was a time of facile Title VII litigation, it surely ended with the demise of intentional violations of equal employment opportunity. Today's parade of Title VII cases present more and more subtle manifestations of discrimination. Proof of invidious practices becomes more difficult as the ability to separate the real violation from the unfounded suspicion grows harder. This is especially so since many employers and unions, including Pullman-Standard and Steelworkers, have made substantial good faith efforts toward eliminating racial distinctions for the work force. Frequently, bargaining which results in minority employees being hired and allowed to progress in their jobs free of discrimination does not accord the Act's intended relief to older black employees. Although the temptation to enforce the accomodation reached by the parties most directly interested is great, it remains part of the court's task to see that these older workers, who bore the brunt of past disparities, do not continue to work at jobs their white peers would not have and for wages less than those paid to recent hires who were not put down because they were black.

A. Red Circling

Red circling is the mechanism by which the wage rate of an affected class member who transfers goes with the man—even though the new department to which he moves would pay the transferee a wage rate less than the old one. The purpose of the remedy is to protect the employee from financial loss until he has an opportunity to learn the necessary skills to progress in the new department to a wage equal to his old department scale.

The district court held that red circling in the instant case was unnecessary for six reasons: (1) "[V]irtually all of the jobs in the transfer out departments have lower job class levels than the lowest jobs in the transfer in departments." (2) There are no lines of promotion or residence requirements to impede promotion in new departments. (3) Frequent manpower fluctuations may create new opportunities. (4) Some of these manpower fluctuations will obviate old wage rates. (5) No training is provided for new jobs. (6) The key reason for affected class members turning down transfer opportunities is apprehension over retreat rights and not the possibility of diminished wages.

Should the court find plant-wide discriminatory departmental assignments were perpetuated by the departmental seniority system, several of the six reasons discussed above would be inapplicable. However, since we hold that some kind of modified red circling system probably will be necessary even if the affected class is not expanded, we do no more than mention this contingency which an expanded affected class would present.

The red circling remedy was originally developed to eliminate impediments to discriminatees rising to their rightful place in a plant. Therefore, whenever the possibility exists of receiving lower wages in the new department, red circling must be ordered. The remedy must continue until the transferee had had an opportunity to progress to the new department job which he would have held but for the past discrimination. For

this reason, it is now clear that red cycling is a necessary element of a Title VII remedy in most,[58] though not all,[59] cases.

The only situation where we have recognized that this part of the remedy would not be mandated is where the plaintiff is unable to show that the absence of red circling presents a practical impediment to *any* affected class member. *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 113 (5th Cir. 1975); *accord, Watkins* v. *Scott Paper co.*, 530 F.2d 1159, 1174 (5th Cir. 1976). The district court's major premises for refusing to order red circling were its conclusions that (1) "virtually all" affected class members will be able to transfer immediately to higher paying jobs and (2) the key reason for nontransfers has been apprehension over retreat rights and not lower wages. Neither reason appears to meet the *Stevenson* and *Watkins* standard. The test is not whether "virtually all" discriminatees will not suffer reduced wages. If *any* will suffer, red circling is appropriate. On remand, unless the district court determines that the plaintiffs have failed to show that *any* discriminatees would suffer diminished wages on transfer, red circling must be ordered.[60] This would also be true should the affected class be expanded on remand. Apprehension over retreat rights could only result from ignorance of the OFCC agreement's provisions. Full and complete retreat rights are guaranteed. Surely neither Pullman-Standard nor the union should or will allow ignorance of rights already conferred to operate as a bar to departmental transfer. When the fear over retreat rights has dissipated, the possibility of reduced wages surely will be seen as the major impediment to transfer. Neither of these considerations can pass the *no*-affected-class-member test.

The four other reasons given by the district court are insufficient to justify its refusal to order red circling.[61] However, the lack of on-the-job training and lines of progression along with frequent fluctuations in the work force indicate that the standard red circling remedy would be inappropriate and that some modification of that remedy is needed.

The purpose of red circling—to eradicate the obvious impediment of lowered wages to transfer to a new department—is meant to protect the affected class transferees only until they have been in the new department a sufficient amount of time to have had a realistic opportunity to become recognized and listed as qualified to work in a job class which pays at least as much as the old department wage rate.

Job manpower fluctuations, which are particularly acute in some departments offering greater advancement opportunity, create problems for devising a remedy which will not go too far and convert the attempted remedy into a windfall. The lack of on-the-job training and lines of progression also present problems for the trial court. They are not ones appropriate for resolution or detailed suggestion here. Suffice it to say that if the remedy is required, it must be devised justly—but, if required, it must be granted despite difficulty in its formulation.

B. Posting

The union contracts with Pullman-Standard do not provide for a formal bidding procedure or a posting of vacancies either plant-wide or department-wide. In fact, not even an after-the-fact notification of changes in assignments was required.[62] Pullman-Standard asserts that the absence of these formal notification and bidding procedure impossible and the posting of assignments unnecessarily burdensome. The plant operates on a "word of mouth"[63] and "personal observation" approach to the notification of job vacancies. In addition the union takes a very active role in monitoring employees' seniority rights.

Plaintiffs requested below that a plant-wide system of posting job vacancies be ordered for the Pullman-Standard plant. The court framed the issue as: "Has there been discrimination in the failure to post publicly a list of changes in assignment?" Its answer was that "the lack of formal procedures for notification neither discriminated nor perpetuated the effects of

any past discrimination against blacks." So addressed, the claim is limited to whether the notification system prevented blacks from taking full advantage of their seniority rights. The court's answer is not clearly erroneous. However, it only answers the questions of nondiscrimination and perpetuation of discrimination presented by the posting issue per se. The propriety of ordering posting to facilitate transfer rights has not been considered.

Not only must posting be examined to see if the lack of a formal system itself discriminates or perpetuates prior discrimination against blacks, but the ordering of a formal posting remedy must be considered as a part of the remedy which will facilitate the advancement of the affected class members to their rightful places in the plant. The illegal discrimination found at Pullman-Standard was racially discriminatory departmental assignment. We hold that the neutral departmental seniority system has perpetuated that discrimination into the present. Carry-over seniority, red circling, and backpay are parts of the total remedy. The need of a formal system of notification of plant-wide vacancies to make the remedy efficacious must also be reconsidered. If *any* affected class member would be prevented from exercising his transfer rights because the present non-system failed to notify him of a vacancy then some more formal system of notification must be ordered unless business necessity prevents it.[64]

C. Backpay

The district court did not award any backpay, and except for one small subclass of discriminatees no adjudication regarding backpay has been made in the instant case.[65] Plaintiffs' attack on the failure to award any backpay in this action is premature. The pretrial order of June 5, 1974 severed backpay claims for a subsequent trial should they be necessary.

The OFCC agreement identified five all-white departments and allowed blacks hired prior to April 30, 1965, to transfer into these departments with carry-over departmental seniority as vacancies occurred. The trial court ordered that the cut-off date for transfer into three of these departments, plant protection, inspection, and air brake departments, be extended until June 1, 1967, June 1, 1970, and June 1, 1971, respectively, to allow blacks who were discriminatorily prevented from being assigned to those departments adequate transfer rights. The court recognized that any blacks hired between April 30, 1965 and these new dates were entitled to backpay. However, it also recognized that no backpay would be necessary if there were no vacancies in these departments prior to transfer.

The court did not hold that there were *no* vacancies; instead, it held there were not enough vacancies to allow this class of employees at the bottom of the eligibility group to be assigned to these departments. Here the district court obviously had reference to the priority enjoyed by senior affected class members which would preclude workers in the expanded affected class from eligibility for transfer to one of these departments. This finding by the court is not clearly erroneous. However, the legal conclusion that the expanded class is not entitled to backpay must be reversed since it was reached using an erroneous legal principal.

A finding of *no* vacancies in these departments would support a conclusion that no entitlement to backpay existed, as would a finding that all vacancies were filled by more senior discriminatees. The court did not make either clear-cut, absolute factual finding. Rather, it inferred that since there were so few vacancies and since the expanded affected class' priority was so low, they would have been precluded by more senior discriminatees. This inference is precluded by *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975).

Baxter requires a two phase backpay inquiry. During the first or general phase the class must show its entitlement to backpay. This is presumptively shown once employment discrimination has been found.[66] The second or specific phase allows each discriminatee to present the backpay claim to which he is presumptively entitled unless the defendant bears the burden of proving nonentitlement. A general inference of class-wide unavailability of vacancies is insufficient.[67] To avoid liability the defendant must show during phase one that no vacancies whatsoever were available or during phase two it must show that the particular discriminatees seeking backpay could not have been assigned to that department nor transferred to it because of the unavailability of vacancies they were eligible to fill.

Of course, we pretermit any indication of appropriate resolution of the severed claims for backpay. We would only note that if on remand the court should expand the affected class, substantial backpay issues would be raised.[68]

IV. SUPERVISORY PERSONNEL

The appointment of supervisory personnel at Pullman-Standard is done totally subjectively. There are no established criteria for selection of new foremen. The plant manager and superintendent choose department heads (C foremen) who in turn select track supervisors (B foremen), production foremen (A or salaried foremen) and hourly (temporary) foremen. Plaintiffs contend that prior to 1965 there were no black foremen. In 1966 the first black salaried foreman was promoted to one of the 143 existing salaried foreman positions. Four years later there were only nine black salaried foremen while there were 151 white foremen. At the time of trial there were 13 departments in which blacks had never been offered either salaried or temporary foreman positions. Since 1966 and until the time of this trial there were at least 59 salaried foreman vacancies. Only 12 of these were filled by blacks.

The district court essentially agreed that these statistics were correct but chose to focus on the selection of hourly foremen since they in turn formed the source group for the selection of salaried foremen. The court found that since 1965, 56 blacks — approximately ⅓ of the total number — have been selected as hourly foremen. Recognizing that this was a lower percentage than the approximately 50% of black personnel in the plant, the court found four factors which ameliorated the otherwise compelling inference of discriminatory promotion.

1. The court found as a fact that a greater number of blacks than whites were functionally illiterate and, therefore, were less likely candidates for promotion. Educational requirements which operate disporportionately to exclude blacks may not be used unless they pass Title VII validation and business necessity muster.[69] The court itself recognized in a footnote that it was not holding that some particular level of education was allowable under Title VII. Despite this recognized absence from the record of validation or business necessity proof, the court found this absence of functional literacy would render black employees "less likely" candidates for promotion. This non sequitur is impermissible.[70] Since no minimum educational requirement was proven legal under the strict guidelines of Title VII, the "requirement" may not be used as a generalized inference to explain why blacks were not potential supervisors.

2. The court found that 30 blacks and 17 whites have turned down hourly foremen opportunities since the mid-1960's. This, of course, is a legitimate item of rebuttal to a prima facie case. The most statistically pure representation of discrimination would be the percentage of black vs. white offers of promotion. A comparison of actual appointments with the number of turned down offers would enable the court, if the number of actual offers was not before it, to approach this statistically sterile measure.

3. The court concluded that due to pre-'65 segregation of jobs, it has taken blacks some time to learn the range of job skills necessary to perform supervisory duties. This justification for not promoting blacks to supervisory positions has been uniformly rejected by this court. Before such justification could be considered the defendants would have to prove that unpromoted blacks did in fact lack the necessary skills; that the needed skills are justified by a business necessity; and, if plaintiffs could show that the failure to gain these skills was the result of a neutral policy which perpetuated past discrimination, defendants would have to show that the policy was justified by business necessity.[11] Since none of these facts were found by the lower court, it was improper to consider this item as indicative of nondiscrimination.

4. The district court noted the recent dramatic improvement in black promotions to salaried supervisor. Between 1971 and 1974, eight of the twenty newly appointed foremen were black. This figure is clearly indicative of the lack of discrimination in promotion. It is appropirate to consider it as counterbalancing evidence of the statistics indicative of discrimination which were presented by the plaintiffs.

Since two of the four reasons given for finding that the plaintiffs' statistics did not establish a prima facie case of racially discriminatory promotion to supervisory positions were erroneously considered, the court's conclusion that no discrimination was proven is reversed. We do not conclude, however, that the evidence clearly makes out a prima facie case. Instead, we remand to the district court to balance recent promotion statistics and black turn-downs against the overall statistics presented by the plaintiffs.[12] The inference to be drawn from this balancing of the evidence is for the lower court. Should the court desire supplemental evidence in its reconsidering it may on remand open the record to evidence concerning promotions made since trial.

V. WORK WITHIN THE SAME JOB CLASS

With but one exception the management of Pullman-Standard has the sole authority under the collective bargaining agreement to assign work among employees working within a given job class in a given department. The only exception is that members of the welding department are able to bid to their supervisors for "sub-assembly" work according to departmental seniority. Plaintiffs argue that the supervisors in exercising this unbridled discretion give the more desirable assignments to white employees and the less desirable ones to blacks. The lower court not only found that the plaintiffs had failed to prove that blacks were assigned to less desirable tasks within each job class, it also found that the plaintiffs were unable to prove which tasks were more or less desirable. The totality of the proof clearly showed that various employees had varying interpretations of which tasks within each job class were more or less desirable. Given nothing but this kind of subjective opinion evidence, especially since the credibility of each witness was at the core of the issue, we are unable to say that the lower court's factual conclusion was clearly erroneous.

VI. INDIVIDUAL CLAIMS

The lower court concluded that Louis Swint and Clyde Humphrey were not discharged for racial reasons as alleged. Insubordination, the principal reason given for the discharge in each instance, was more than amply justified. The court's conclusion that there was not even the slightest evidence anywhere in the record upon which it could indulge the inference that these individuals were fired because they were black is not clearly erroneous.

VII. NOTICE OF APPEAL

Pullman-Standard's attempt to limit the issues on appeal solely to these presented by Louis Swint in his individual capacity is without merit. *Jones* v. *Chaney & James Construction Co.*, 399 F.2d 84, 86 (5th Cir. 1968); *Markham* v. *Holt*, 369 F.2d 940, 943 (5th Cir. 1966); *see Foman* v. *Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225 (1962).

CONCLUSION

The judgment appealed from is vacated and the cause is remanded to the district court for such proceedings as that court may determine are appropriate or necessary to compliance with this opinion.

AFFIRMED IN PART, PART VACATED AND REMANDED.

SWINT II - Footnotes

[1] The factual statement was taken substantially verbatim from the opinion of the disrict court.

[2] Orders may be for as few as 25 cars or for several thousand.

[3] The number of workers in Steelworkers units at the Bessemer plant varies from over 2,800 at peak employment periods to less than 200 at the lowest levels. During 1973, which was not abnormal in this respect, on only three occasions was the employment level in one week approximately equal to that of the prior week. Indeed, a chart based upon monthly employment hours from early 1958 to mid-1974 reflects only a very few times that hours worked in one month have been approximately the same as in any of the two months preceding or following. Changes in the work force were occurring during the several weeks this case was tried.

[4] Millwrights and certain employees in the Die and Tool Department are represented by the International Association of Machinists and Aerospace Workers, AFL-CIO. For the limited purpose that some of the relief sought by plaintiffs might entail possible modification of its contract with Pullman-Standard, the I.A.M. and its Local Lodge 372 were joined as defendants named in any charges before the EEOC or involved in the allegations of the pleadings in this case.

[5] While the job classification manual lists some 250 jobs, many of these are not worked at Pullman-Standard, and several of the classifications—particularly, laborer, cleanup, craneman, and hook-on—appear in a number of departments as separate listings. The plaintiffs identified 123 jobs from the June 1973 seniority rosters, but even this figure includes duplications where the same job appears in more than one department.

[6] According to data showing the average number of persons drawing paychecks by department over an 18-month period ending June 1974, over 50% of the employees work in the Welding and Steel Erection Departments and almost 77% work in those departments plus the next four largest (Paint & Shipping Track, Punch & Shear, Steel Construction, and Maintenance).

[7] For example, Cleanup man, JC 1, has the lowest nonincentive standard hourly rate ($3,635 as of October 1973), while Template Maker Craft, JC 20, has the highest such wage ($5,399 as of October 1973). Piece-rate scales and production quotas are frequently of great significance in determining the actual earnings potential of a particular job.

[8] There are a score or so of female production and maintenance workers at Pullman, both white and black. Due to the predominance of male employees, however, the masculine gender for pronouns is used for convenience in this opinion.

[9] Actual work-hour figures for 1965 were not available; nor was the June 1, 1965 seniority list. However, by looking at the June 1964 seniority list and by taking account of the additions and deletions to that list representing hires and terminations during the year, the trial court constructed the functional equivalent of the June 1965 list. This calculation reflects 1,151 blacks and 1,773 whites on the seniority list as of June 1, 1965. While the seniority list does not absolutely reflect actual employment at any particular time, it does bear a significant correlation therewith in a period of high employment, such as June 1965 (in excess of 2,350 average workers for the month). It may be noted that the actual employment of blacks in the December 1972-June 1974 period, *i.e.*, 49.5%, exceeded slightly the percentage of blacks on the seniority lists for June 1972 and June 1973, *i. e.*, 44% and 46% respectively.

[10] That the percentage of black workers at Pullman-Standard is higher than the percentage of black population or work force in Jefferson County, or even in Bessemer, does not, however, indicate hiring bias in favor of blacks. While data has not been compiled to compare actual applications for employment with hiring at Pullman for the period, one can, by analyzing the seniority rosters from 1966 through 1973, determine that approximately 36% of the new hires during that period were black, a percentage which is compatible with work force and population data from the census. Presumably, the analysis of quits and discharges during 1971 showing that during that year almost three times as many whites as blacks either quit or were discharged, would be typical for the entire period. One may speculate that relative job opportunities with other employers were better for whites than for blacks and that relatively more blacks than whites chose to accept recall to Pullman after layoffs.

[11] For a number of years the labor agreement had contained language requiring its provisions to be applied without discrimination, but prior to the McCoy arbitration decision in March 1965 this language had been without apparent significance.

[12] A temporary promotion results in some increase in compensation and, perhaps more significantly, is the principal avenue by which an employee can obtain recognition as capable of satisfactorily performing the job.

[13] The memorandum contained provisions similar to those later incorporated in the 1972 agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

[14] Over a hundred blacks have received welder training at company expense and become welders at Pullman (though many have since gone with other companies). Without denying the benefits such training has provided to blacks, plaintiffs do note that with respect to welder jobs, the company has instituted a requirement that before it will test a welder's competency the employee must now show either formal training or field experience with some other company.

[15] The union has never formally adopted the agreement, but in practice has accepted the terms thereof to the extent that it must be deemed bound thereby.

[16] Employees from the low-ceiling departments, if possessing minimal qualifications, can also obtain vacancies arising in the I.A.M. units. In such event, they take their plant age into such units for the purposes of layoff and recall and, when vying against other apprentices at the same level, for promotional purposes. Without formally concurring in the agreement, the I.A.M. has apparently accepted the provisions and implicitly agreed to be bound thereby.

[17] The class was defined as consisting of all black persons who at any time subsequent to 1 year prior to the filing of any charges with the EEOC had been employed by Pullman-Standard (at its Bessemer plant) as production or maintenance workers in positions represented by the United Steelworkers. General notification to class members specified these as the issues in the case and stated that the entitlement to back pay, if any, by any members of the class would be determined by subsequent hearings, but only if the class prevailed on one or more of the four issues.

[18] In the pretrial order this issue was defined as subsuming the contentions on behalf of the class that the agreement with the Department of Labor was inadequate in the following respects: the transfer rights applied only to four departments; the agreement did not provide for "red circling", *i. e.*, carrying an old wage rate into a new department upon transfer; only a single transfer was provided; and transfers to I.A.M. positions were not afforded. At conferences during the trial of

the case it became apparent that plainitffs also contended that the transfer rights should have been extended to black employees hired in the 1965-68 period, rather than being limited to pre-May 1965 employees.

[19] Mr. Swint's claims are premised on 42 U.S.C.A. §§ 1981, 2000e—2(a)(1), and 2000e—3(a), while Mr. Humphrey's is grounded only upon 42 U.S.C.A. § 1981.

[20] We recognize that the lower court concluded that discriminatory departmental assignment was present in the nine departments covered by the OFCC agreement (Template, Power, Inspection, Air Brake, Steel Miscellaneous, Plant Protection, Truck, Die & Tool, Janitor). The court, however, determined that the agreement, except for an adopted time extension, adequately eliminated the perpetuation of the discrimination which would otherwise be inherent in the departmental seniority system.

[21] The following chart, constructed by the lower court, reflects by department, ranked by job class ranges, the racial composition of the work force in June 1965, together with certain accumulating percentage figures.

The district court provided the following explanation of the chart:

> A ranking according to job class levels does not mean that each employee would so rank the departments in terms of desirability; but it does provide *a rough index of earnings potentials* in the absence of other more reliable data, such as average earnings or average job class worked. For the Welding department, the court has disregarded the highest job, Welder-Craft (JC 16), using instead the next highest job class, this adjustment being made because the highest position offers such few opportunities considering the size of the department, *i. e.*, less than 1% of the department jobs. This study is based upon seniority rosters in the absence of data showing actual distribution of the work force by departments . . . . [P]ercentage Column II disregards employees for the nine depatments involved in the agreement with the Department of Labor and percentage Column III further disregards the Maintenance and Welding departments. (Emphasis added).

DEPARTMENT	JOB CLASS RANGE	NUMBER OF EMPLOYEES		I		II		III	
		#B	#W	%B	%W	%B	%W	%B	%W
Template	2.20	0	9	0.	0.77	-	-	-	-
Maint.	4.18	26	98	2.26	9.12	2.54	8.98	-	-
- Forge	1.17	12	20	3.30	10.06	3.71	10.81	-	-
Power.	6-16	0	4	3.30	11.17	-	-	1.43	6.35
Inspec.	12-13	0	28	3.30	13.55	-	-	-	-
- Punch & S	1-13	120	28	13.73	15.94	15.41	13.38	15.75	15.24
Mob. Cr.	5-12	3	2	13.99	16.11	15.71	13.56	16.11	15.87
- Press	1-12	48	17	18.16	17.56	20.39	15.12	21.84	21.27
Rail.	7-11	8	10	18.85	18.41	21.17	16.03	2.79	24.44
Air Brake	6-11	0	27	18.85	20.72	-	-	-	-
- S. Const.	1-11	124	18	29.63	22.25	33.27	17.69	37.59	30.16
- Paint. ST	1-11	91	84	37.53	29.41	42.15	25.39	48.45	56.83
- S.Erec	1-11	290	41	62.73	32.91	70.44	29.14	83.05	69.84
- W.Erec.	1-11	65	35	68.37	35.89	76.78	32.35	90.81	80.95
W.Mill	1-11	7	17	68.98	37.34	77.46	33.91	91.65	86.35
Welding	1-10	161	678	82.97	95.14	93.17	96.05	-	-
Wheel & A	1-10	13	30	84.10	96.84	94.44	97.88	93.20	92.70
- S.Misc.	2- 9	86	2	91.57	97.01	-	-	-	-
- S. Stores	2- 9	45	10	95.48	97.87	98.83	98.80	98.57	95.87
P.Protec.	6- 8	0	12	95.48	98.89	-	-	-	-
L. Stores	3- 8	5	7	95.92	99.49	99.32	99.44	99.16	98.10
M. Stores	3- 8	7	6	96.52	100	100	100	100	100
- Truck	1- 6	21	0	98.35	100	-	-	-	-
- D & T	1- 5	9	0	99.13	100	-	-	-	-
- Janitor	1	10	0	100	100	-	-	-	-
		1151	1173						

[22] Most courts use some kind of average salary comparison instead of wage range comparison. *See, e. g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, *cert. denied* (5th Cir. 1974), 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). Even the lower court in an explanatory note to the chart recognized that a average hourly wage comparison would be preferable. The only two cases which have used wage range comparisons are distinguishable. In *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), the court used job class (not department) ranges—the court was examining discriminatory promotion and hiring, not perpetuation of discrimination caused by departmental seniority. In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va. 1968), discussed *infra*, the court ordered plantwide seniority even though blacks wre not assigned to departments with the least desirable wage ranges.

[23] The chart below ranks the departments in Column III of the district court's chart according to job class median. Departments having the same job class median are ranked, in descending order, according to size, Maintenance CIO and Welding are included while the Mobile Crane Department is not.

Median Job Classes of "Mixed" Departments
As of June 1, 1965

Department	Job Class Median	Median JC Blacks	% Blacks in Dept.	Accum. % B.	W.
Maint. CIO	13	4	21.0	2.5	8.9
Welding	10	6	19.2	18.3	70.6
Paint & ST	7	6	52.0	27.2	78.2
Railroad	7	7	44.4	28.0	79.1
Steel Erection	6	6	87.6	56.4	82.8
Steel Constr.	6	6	87.3	68.5	84.4
Wheel & Axle	6	6	30.2	69.8	87.1
Forge	6	2	37.5	71.0	88.9
Misc. Stores	6	7	53.8	71.7	89.4
Wood Mill	5	2	29.2	72.4	90.9
Punch & Shear	4	3	81.1	84.1	93.4
Wood Erection	4	2	65.0	90.5	96.6
Press	4	4	73.8	95.2	98.1
Lumber Stores	3	3	41.7	95.7	98.7
Steel Stores	2	2	81.8	100.1	99.6

[24] *See United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970) reversing a lower court's failure to consider evidence of black exclusion from a welding department, *albeit* for other reasons.

[25] *See, e. g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[26] The court did, however, recognize that there were no formal lines of progression designed to teach these skills.

[27] *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1177-78 (5th Cir. 1976); *cf. United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[28] *See, e. g., Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1165 (5th Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 726 (5th Cir. 1976); *United States* v. *T.I.M.E.—D.C., 517 F.2d 299 (5th Cir. 1975), cert. granted,* ____U.S.____, 96 S.kCt. 2200, 48 L.Ed.2d 814, (1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 107 (5th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Rogers* v. *International Paper Co., 510 F.2d 1340 (8th Cir.), as modified*, 526 F.2d 722 (1975); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Herrera* v. *Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974); *Resendis* v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974); *cert. denied*, ____ U.S. ___ ., 96 S.Ct. 2201, 48 L.Ed.2d 815 (1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 51., 42 L.Ed.2d 388 (1975); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1368 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 355 (8th Cir. 1973); *United States* v. *Georgia Power*, 474 F.2d 906, 910 (5th Cir. 1973); *United States* v. *Cheaspeake & Ohio Ry.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 307 (8th Cir. 1972); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *United States* v. *Bethlehem Steel*, 446 F.2d 652 (2d Cir. 1970); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert.*

dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 246 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971); *United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970).

[29] Although four departments were discussed in *Quarles*, only three departments were involved in the relief ordered.

[30] The conclusion which relied on *United States* v. *Hayes International Corp. (Hayes I)*, 415 F.2d 1038 (5th Cir. 1969), was phrase: "equity may for the purposes of injunctive relief presume damages from the invasion of a legal right. . . ." *United States* v. *United States Steel*, 371 F.Supp. 1045, 1058 (N.D.Ala. 1973).

[31] *E.g.*, *Morrow* v. *Crisler*, 479 F.2d 960 (5th Cir.1973), *aff'd en banc*, 491 F.2d 1053 (1974); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

[32] *See Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *cert. granted*, ____ *U.S.* ____, *96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).*

[33] *See Ochoa* v. *Monsanto*, 473 F.2d 318, 319 (5th Cir. 1973); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.) *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

[34] *See United States* v. *United States Steel*, 520 F.2d 1043, 1053 (5th Cir. 1976).

[35] This conclusion, however, should not be misconstrued as a holding that departmental desirability is irrelevant. In fact, departmental desirability could be relevant to the establishment of a prima facie case in two instances: First, as pointed out in *U.S. Steel*, if backpay is sought and if the defendants have convincingly brought into question the class's entitlement to it, economic harm must be shown. Second, a showing that the departments to which blacks have disproportionately been assigned are less desirable departments is probative of racial discrimination. Such a showing could in fact be crucial to the establishment of a prima facie case when the racially disparate assignments are not substantial in number or proportion.

[36] The relevant inquiry has been variously defined: "pattern and practice," *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 729 (5th Cir. 1976); "broad patterns and practices, as opposed to individual damages," *United States* v. *United States Steel*, 520 F.2d 1043, 1049 (5th Cir. 1976); "pattern of past discriminatory hiring," *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1261 (5th Cir. 1975); "history of racial discrimination," *EEOC* v. *Detroit Edison*, 515 F.2d 301, 313 (6th Cir. 1975); "history of employment discrimination,"

Johnson v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1373 (5th Cir. 1974); "historical pattern," *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023, 1025 (6th Cir. 1973); "policy of racial assignment," *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 875 (6th Cir. 1973); "pattern and practice of racial discrimination in hiring," *Morrow* v. *Crisler*, 479 F.2d 960, 962 (5th Cir. 1973), *aff'd en banc*, 491 F.2d 1053 (5th Cir.1974); "practices, policies or patterns," *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), *quoting United States* v. *Dillon Supply co.*, 429 F.2d 800, 804 (4th Cir. 1970); "plant-wide system-wide racially discriminatory employment practices," *Jenkins* v. *United Gas Co.*, 400 F.2d 28, 34 (5th Cir. 1968).

[37] *See Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975). *Baxter* delineates two phases for the Title VII inquiry. Phase One is reserved for class-wide determinations and Phase Two for individual proof of damages for backpay purposes and the assertion of defenses as to individuals.

[38] *See generally Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *United States* v. *United States Steel*, 520 F.2d 1043 (5thCir. 1976); *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir.1975), *cert. granted*, ____ U.S. ____,96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

[39] In *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 375 (8th Cir. 1973), the reviewing court first established that a prima facie case had been shown and then proceeded to delineate the bounds of the affected class. *See also Stevenson* v. *International Paper Co.*, 516 F.2d 103, 117-18 (5th Cir. 1975).

[40] In rejecting the limitation of the scope of the court's examination to the statistical imbalance of nine departments, we likewise reject the notion that a Title VII prima facie case of discriminations could be shown merely by proving that some departments in a plant do not approximate the racial makeup of the plant.

[41] *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747,96 S.Ct.1251, 47 L.Ed.2d 444 (1976); *Johnson* v. *Goodyear Tire & Rubber*, 491 F.2d 1364 (5th Cir.1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354,355 (8th Cir. 1973); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 306 (8th Cir. 1972); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (5th Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

[42] In evaluating the evidence presented in *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir.1971), *cert denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), this court stated:

> Certainly the weight to be accorded this [discriminatory] inference varies: much depends on the correctness, completeness, and comprehensiveness of the figures proffered. Measured by these criteria, the Government's statistics *sub judice* should have been given substantial weight. They disclose that *all* persons hired for higher paying positions and *most* people promoted to these jobs after Title VII's effective date were white. Absent explanatory evidence and tesimony, the statistics indicate that officials have impliedly equated job qualifications with race.

[43] *See Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States* v. *Bethlehem Steel*, 446 F.2d 652 (2d Cir. 1970); *cf. United States* v. *T.I.M.E.- D.C.*, 517 F.2d 299 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

[44] The existence of an OFCC agreement does not provide the company with a defense to the Title VII action. *See Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1166 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 106 (5th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir.), *as modified*, 526 F.2d 722 (1975); *United Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir.1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

[45] *See* notes 25 & 27 *supra*.

[46] Title VII cases have often considered similar historical discrimination policies in evaluating the prima facie case aspect. *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1165 (5th Cir. 1965); *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 107 (5th Cir. 1975); *Gamble* v. *Birmingham So. R.R.*, 514 F.2d 678 (5th Cir.1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir.), *as modified*, 526 F.2d 722 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 221 (5th Cir.1975); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1369 (5th Cir. 1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 355 (8th Cir. 1973); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 306 (8th Cir. 1972).

[47] *See* note 46 *supra*.

[48] In this highly volatile employment, workers were frequently laid off. Plaintiffs contend that the reason this gross pay comparison looked as good as it did was because blacks working at lower paying jobs with better seniority experienced fewer layoffs. Thus to receive comparable payments from Pullman-Standard, whites worked fewer hours and drew unemployment benefits while vacationing or working at jobs for others. The district court indicated this contention might have some probity by its finding that the desirability of majority black jobs was enhanced by stability and less frequent lay offs than higher paying majority white jobs.

[49] This court has previously indicated in dicta that consideration should be given to including supervisory and clerical personnel, especially if they are heavily white, in such average yearly wage racial comparisons. *United States* v. *Hayes International Corp. (Hayes I)*, 415 F.2d 1038, 1040 n. 3 (5th Cir. 1974).

[50] The use of statistics and similarly statistical wage comparisons must be conditional on the "absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn." *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971); *accord, Ochoa* v. *Monsanto Co.*, 473 F.2d 318, 319 (5th Cir. 1973); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[51] For an example of this prima facie case approach, see *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). There, this court focused on the percentage variance from the plant's racial norm in each department, various tests and educational requirements which were hiring and transferring barriers, lower paying disproportionate black departments, and past official policies of segregation in the plant. The court found that the combination of all of these items made out a prima facie case of plant-wide discriminatory departmental assignment.

[52] *E.g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 729 (5th Cir. 1976); *United States* v. *United States Steel*, 520 F.2d 1043 (5th Cir. 1975); *United States* v. *T.I.M.E.-D.C.*, 518 F.2d 299, 313 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1255 (5th Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 111-12 (5th Cir. 1975); *EEOC* v. *Detroit Edison*, 515 F.2d 301, 313 (6th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340

(8th Cir.), *as modified,* 526 F.2d 722 (1975); *Carey* v. *Greyhound Bus Co.,* 500 F.2d 1372, 1376 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974); *United States* v. *Chesapeake & Ohio Ry.,* 471 F.2d 582, 593 (4th Cir. 1972); *United States* v. *Bethlehem Steel Co.,* 446 F.2d 652, 660-61 (2d Cir. 1970); *Jones* v. *Lee Way Motor Freight,* 431 F.2d 245 (10th Cir. 1970), *cert. denied,* 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

[53] *Watkins* v. *Scott Paper Co.,* 530 F.2d 1159, 1168 (5th Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.,* 529 F.2d 721 (5th Cir. 1976); *Sabala* v. *Western Gillette, Inc.,* 516 F.2d 1251, 1262 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 243 (5th Cir. 1974); *Bing* v. *Roadway Express, Inc. (Bing II),* 485 F.2d 441 (5th Cir. 1973); *United States* v. *Georgia Power,* 474 F.2d 906 (5th Cir. 1973).

[54] The carry-over of antecedent seniority need not be granted to every employee; it is compelled only for victims of prior discrimination, dubbed by the courts to be members of the 'affected class.' Although the gravamen of an attack on the seniority forfeiture provision may be its inhibition of minority transfer, the affected class clearly includes those who already have transferred, incurring the loss, as well as those inhibited from transfer. On the other hand, the affected class is not necessarily that described by plaintiffs in the class action paragraph of their complaint nor does it extend to those hired after discrimination has ceased.

Stacy, Title VII Seniority Remedies in a Time of Economic Downtown, 28 Vand.L.Rev. 487, 496-97 (1975).

[55] *See, e.g., Rodriquez* v. *East Texas Motor Freight,* 505 F.2d 50 (5th Cir. 1974), *cert. granted,* ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974).

[56] *See, e.g., EEOC* v. *Detroit Edison,* 515 F.2d 301, 316 (6th Cir. 1975); *United Papermakers, Local 189* v. *United States,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

[57] "Though this rule seems simple, it has been misapplied to foreclose class membership to blacks hired after the assignment of just one white to a previously all-black department. *E.g., Johnson* v. *Goodyear Tire & Rubber Co.,* 349 F.Supp. 3, 16 (S.D.Tex.1972), *modified,* 491 F.2d 1364, 1374 (5th Cir. 1974)." Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 24 Vand.L.Rev. 487, 497 n. 73 (1975). *See Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1374 (5th Cir. 1974).

[58] *Watkins* v. *Scott Paper Co.,* 530 F.2d 1159, 1174 (5th Cir. 1976); *citing Stevenson* v. *International Paper Co.,* 516 F.2d 103, 112 (5th Cir. 1975) *and Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 248 n. 99 (5th Cir. 1974); *accord, Rogers* v. *International Paper Co.,* 510 F.2d 1340, 1355-56 *as modified,* 526 F.2d 722 (8th Cir. 1975); *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 375-76 (8th Cir. 1973; *Long* v. *Georgia Kraft Co.,* 450 F.2d 557, 560 (5th Cir. 1971); *United States* v. *Bethlehem Steel,* 446 F.2d 652, 659 (2d Cir. 1970).

[59] *Stevenson* v. *International Paper Co.,* 516 F.2d 103, 112 (5th Cir. 1975):

> We do not hold as a matter of law that there should always be . . . red circling . . . . The requirement for and feasibility of the remedy turn on factual matters.

[60] If the district judge chooses to credit all testimony, the present record indicates that some discriminatees might initially suffer reduced wages by transferring to another department. Whether this reduced wage phenomenon would be the result of a departmental reduction in force is not clear from the record. We intimate no view as to the proper resolution of this issue.

[61] The following are the other reasons given by the district court: (1) There are no lines of promotion or residence requirements to impede promotion in new departments. (2) Frequent manpower fluctuations may create new opportunities. (3) Some of these manpower fluctuations will obviate old wage rates. (4) No training is provided for new jobs.

[62] By company consent an after-the-fact notification process has begun.

[63] Word of mouth notification systems, at least for purposes of publicizing job vacancies, have been alluded to as being inherently prejudicial to blacks in majority white plants. *E.g., United States* v. *Georgia Power*, 474 F.2d 906, 925 (5th Cir. 1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

[64] *Cf. Stevenson* v. *International Paper Co.*, 516 F.2d 103, 112-113 (5th Cir. 1975); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1174 (5th Cir. 1976).

> This reconsideration should not be limited to only considering the word of mouth notification system. It should also consider the recently instituted system of posting daily turn-over sheets, monitoring provided by union members, and notification provided by contract compliance officers. If any such system is to be instituted, the business necessity defense which was not reached by the court before, should be considered.

[65] In a footnote to its opinion the district court held one subclass was not entitled to backpay.

[66] *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1374 (5th Cir. 1974); *accord, Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 712-20 (7th Cir. 1969).

[67] "Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 1268, 47 L.Ed.2d 444 (1976).

[68] *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975); *Sabala* v. *Western Gillette Inc.*, 516 F.2d 1251, 1264 (5th Cir. 1975); *Gamble* v. *Birmingham So. R.R.*, 514 F.2d 678, 686 (5th Cir. 1975); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372, 1378 (5th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442-45 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 388 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 251-53 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974); *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023, 1028 (6th Cir.

1973); *United States* v. *Georgia Power*, 474 F.2d 906, 921 (5th Cir. 1973); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (5th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

[69] *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[70] Plaintiffs claim that some whites promoted to foremen had less formal education than some blacks who were not promoted.

[71] *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1192 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 117 (5th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1344, *as modified*, 526 F.2d 722 (8th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 59 (5th Cir. 1974), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 249 (5th Cir. 1974); *Rowe* v. *General Motors*, 457 F.2d 348, 358 (5th Cir. 1972).

[72] We note in this regard that the use of subjective promotion criteria by mostly white foremen has been held to be a ready mechanism for racial discrimination in promotion. *Rowe* v. *General Motors*, 457 F.2d 348, 358-59 (5th Cir. 1972); *accord*, *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1192-93 (5th Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 241 (5th Cir. 1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 367-68 (8th Cir. 1973).

SWINT III

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, a Division of Pullman, Inc., et al., No. CA 71-P-0995-S, July 5, 1977

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John C. Falkenberry (Cooper, Mitch & Crawford), Birmingham, Ala., for union defendants.

SAM C. POINTER, Jr., District Judge: — On September 13, 1974, this court denied the plaintiffs' several claims of racial discrimination. 8 EDP ¶9720, 11 FEP Cases 943. On August 30, 1976, the Fifth Circuit remanded the case for further proceedings with respect to two issues — the seniority system and the selection of supervisors. 539 F.2d 77, 13 FEP Cases 604.[1] On February 22-23, 1977, after conferences and further pretrial briefing, additional evidence was taken and the case resubmit-

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1 All footnotes for this section appear at the end of this opinion, pp. 173a to 177a.

ted. Final decision was delayed in anticipation of potentially relevant Supreme Court cases, which, as it turned out, are indeed of critical significance in the case sub judice.[2] See International Brotherhood of Teamsters v. U.S., — U.S. — , 45 LW 4506, 14 FEP Cases 1514 (May 13, 1977); United Air Lines, Inc. v. Evans, — U.S. — , 45 LW 4566, 14 FEP Cases 1510 (May 31, 1977).

I. Seniority System

This court had found Pullman's departmental seniority system not to be in violation of Title VII, basing its decision in large part upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignments to most of the departments.[3] The Fifth Circuit directed that this finding be reconsidered, emphasizing that past discrimination in assignments could be established, at least as a part of plaintiffs' *prima facie* case, without regard to the relative desirability of those departments — i.e., that in employment situations, as with schools, there is no "separate but equal" doctrine. The Circuit also reviewed in depth the procedures to be followed under existing precedents should, on such reconsideration, the trial court determine that a *prima facie* case of discriminatory assignments was shown.

In the initial trial court decision and on the appellate review, principal attention was focused upon the extent, if any, to which there had been shown discrimination in departmental assignments prior to June 1965. It was sufficient to look to such a time period because it provided the evidence most favorable to plaintiffs' claims of discriminatory assignments and because, under the then state of the law, a violation of Title VII was considered proved by showing a seniority system which perpetuated the effects of discriminatory assignments which pre-dated Title VII.

The Supreme Court decisions in the Teamsters and United Air Lines cases require, however, this court to place primary[4] attention upon a later period of time — starting ninety days before the filing of the first EEOC charge reasonably related thereto. These cases, in conjunction with the Franks case, teach that a "valid" seniority system does not violate Title VII even if it perpetuates the effects of past discrimination, although such a system may have to yield, subject to considerations of equity, to remedial measures ordered for persons injured by discriminatory acts timely challenged and pursued under Title VII. Looking to the earliest related EEOC charge,[5] what this means is that the court must, if it determines that the seniority system was "valid", also determine whether and to what extent there were discriminatory assignments to departments on and after December 27, 1966.[6] Evidence of discriminatory assignments prior to June 1965 or, indeed, prior to 1967, no longer forms the basis for the plaintiffs' claims, but is now useful only for its circumstantial value.

An initial inquiry is whether the seniority system at Pullman is "valid" — a word chosen by this court to encompass the several requirements imposed by statute and viable judicial precedents. As was implicit in its original opinion but is now made explicit, the court finds —subject only to the implications of the 1972 changes — that the seniority system was adopted[7] and has been maintained[8] free of any racial purposes; that it is neutral in form, applying equally to all; that it is consistent with industry practice and, particularly for a company with the operational characteristics of Pullman, quite rational; and that it has been uniformly followed for all, regardless of race.[9]

The one qualification to the foregoing stems from the 1972 changes to the seniority rules under the Department of Labor agreement. For the purpose of correcting possible past

discrimination, blacks hired before June 1965 were given special seniority benefits, detailed in this court's original opinion. To the extent of those changes, Pullman has seniority rules which are purposefully discriminatory — in favor of affected blacks — and which are not neutral at all. In the context of this case, the court finds it unnecessary to wrestle with the "reverse discrimination" problem raised thereby.[10] Suffice it to say, that the court finds that the seniority system does not discriminate against blacks and, at least on an attack made by blacks, is "valid" under 42 U.S.C.A. § 2000e-2(h).

For the plaintiffs to prevail on this issue, therefore, they must establish that there were discriminatory departmental assignments after December 27, 1966. One method of proof, approved in the Teamsters case, is by comparing the racial composition of departments with each other and with applicable census information.[11] And, in the present case, exhibits PX 24-30 certainly do reflect that for each of the years 1967 through 1973 there were variations in the racial composition of the departments beyond that expected from random, "colorblind", selection. However, the law recognizes the reality of the situation; namely, that departments are not reshuffled anew each year but are rather, the result of past assignments as well as new ones.[12] Hence, as noted in Teamsters, an employer can overcome the *prima facie* effect of such statistics by showing that "the claimed discriminatory pattern is a product of pre-Act [assignments] rather than unlawful post-Act discrimination." 45 LW at 4515, 14 FEP Cases at 1529. Here, the evidence shows that the somewhat disparate compositions of the departments in the post-1966 period were attributable to the assignments made prior to Title VII, as covered in great detail in this court's prior opinion and in the Fifth Circuit's decision. Indeed, these very exhibits reflect that the extent of departmental variations from the overall work force composition was being reduced each succeeding year during the critical time period.

It is, moreover, possible under the evidence in the case to directly examine the assignment policies of Pullman during the critical years, for one can derive from the records introduced the individual assignments that were made, and there is much information about how these decisions were made. While not reproduced here, the court has made a chart showing, for each year starting June 1966, the number of individuals, by race, assigned to each of the 28 departments. These statistics give rise to no inference that assignments were being made to further a policy of segregated or racially-imbalanced departments. Indeed, if anything the reverse is true: the post-1966 assignments indicate that the company was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white or predominantly-white ones. The evidence reflects, moreover, no specific instances of discriminatory assignments during the post-1966 period and, to the contrary, a policy of actively attempting to get blacks into the formerly all-white jobs, which by and large were the "better" jobs. In Teamsters, the statistical data gave rise to an inference of discrimination, a conclusion "bolstered" by evidence of specific employment practices; here, the statistics for the period in issue give rise to the contrary inference, a conclusion abundantly supported by the other evidence in the case.

To what extent was there a policy of discriminatory departmental assignments in earlier years? An answer to this question would have been critical to the plaintiffs' claims prior to the recent Supreme Court decisions, and still may be of circumstantial value. The court has carefully reevaluated the evidence in the light of the principles indicated by the Fifth Circuit and does indeed find that there was, prior to March 1965, a policy of discrimination in such assignments which affected not just the nine departments dealt with in the Department of Labor agree-

ment, but indeed, in varying degrees, virtually every department — to the extent that it must be viewed as a plant-wide policy. This conclusion is based not so much on the statistical data, which, as recognized by the Fifth Circuit, is certainly susceptible of different interpretations, as it is upon the implications of the former practice of informally "segregating" most of the jobs at Pullman. The segregation of jobs prior to March 1965 — which certainly must be taken as an employment practice and policy, whether or not ever formally approved by company and union — meant that departmental assignments were likewise dependent upon the nature of the jobs where vacancies existed. If all the jobs of a department were "consigned" to employees of the same race, the department was, of course, totally segregated and departmental assignments were likewise racially determined. But even in mixed departments whose racial composition approximated that of the plant as a whole, the assignments were dependent upon whether particular job openings were for a white or black position, rather than a "mixed" one. What the court is saying is that there was a plant-wide policy of making assignments to departments based on race — not as a policy to segregate departments, but as a means to carry out the plant-wide practice of job segregation.[13]

The practice of job segregation was however upset by an arbitration decision in March 1965 dealing with Rivet Drivers, and over a period of the next several months, prompted in part by the advent of Title VII, it was discarded throughout the plant. Of course, it took some time before the residue of that former practice had essentially been eradicated.[14] The point is that, with the demise of the segregated job practice, so also went the ancillary practice of making departmental assignments based on race. Accordingly, the finding of pre-Act discriminatory assignments does not compel circumstantially a finding that such assignments were made during the period involved in this

lawsuit. It is clear that by December 1966 the company was no longer making assignments to departments based on race — except, that is, to the extent of attempting to rectify imbalances caused by its earlier discriminatory practices — and that the plaintiffs have therefore failed to establish an essential element of their claim.

In its original decision this court had concluded that the company did not immediately abandon its discriminatory assignment policies respecting six of the nine departments involved in the OFCC agreement. The court instead used as a cutoff — for purposes of determining which black employees should have the benefits under that agreement — the dates on which the first white achieved some permanent status in a formerly all-black department or on which the first black obtained such status in a formerly all-white department. Having been directed to reconsider this entire question, the court concludes that its original decision, based largely upon a mechanical application of statistical data respecting a few departments, was incorrect. It concludes, consistent with the remainder of this opinion and upon a reevaluation of the evidence in its totality, that there was not a policy of discriminatory assignments respecting these six departments after 1966 anymore than there was respecting the other departments.

It is perhaps useful to look at the assignments after December 1966 to these six formerly one-race departments. Respecting the three formerly all-white departments: in the Air Brake Department, while the next vacancy (in 1970) was filled by a white, blacks had been tried in the department in 1965 and in 1966, and in 1971 two blacks were assigned to it; in the Inspection Department, while three whites were assigned to it in the 1967-70 period, a black had been tried there in 1967 and two blacks had declined assignment to it in 1969, and indeed six of the 10 inspectors with post-April 1965 seniority dates are black; and in the Plant Protection Department the first vacancy filled after

December 1966 was by a black. Insofar as the formerly all-black departments are concerned, the first vacancy in the Janitor Department after December 1966 was filled by a white; the second vacancy in the Die and Tool Department after that date was filled by a white (and post-Act assignments to the department have more frequently been of whites than of blacks); and in the Truck Department two of the first five vacancies were filled by whites and through the date of trial more whites than blacks were hired into that department. In the other three departments covered by the OFCC agreement, the first vacancies occurring after April 1965 were filled by workers of a race different from the prevailing racial identiy of those departments, dramatizing the change of policy that had taken place.

Special concern was raised in the Fifth Circuit decision as the situation respecting the two formerly all-white IAM departments, a matter which had not been covered in detail in the original decision. The first post-1966 assignments to the Machinist Department (IAM) were three blacks and four whites. The Die & Tool Department (IAM), six blacks and one white were assigned in 1966 and over the next four years seven other blacks and eight whites were assigned to it. The court is convinced that with respect to these departments, as with the other twenty-six departments, there was no policy or practice of discriminatory assignments after December 1966.

Having found that during the applicable time period there was no policy or practice of discriminatory department assignments to any of Pullman's departments, the court is not called upon to treat the relief-oriented issues described by the Fifth Circuit, such as "red circling" and "posting". The court furthermore vacates that part of its earlier decision which had expanded the rights given blacks under the OFCC agreement and which had provided a means for certain blacks to present

back pay claims respecting the effect of the department seniority system upon their prior assignments. It will not therefore be necessary for the court to determine, under teamsters, whether claimants for back pay who did not request assignment or transfer to particular departments would have done so but for knowledge of some contrary company policy — a matter which would be most difficult of proof under the facts of this case showing active efforts by the company to correct past imbalances.

II. Selection of Superivsors

This court had found that plaintiffs failed to make a *prima facie* showing of discrimination in the selecion of supervisors, basing its ruling in part upon two factors which the Fifth Circuit concluded were impermissible under the circumstances.[15] The evidence from the original trial is now due to be reconsidered in conjunction with the additional evidence presented after remand.

At the time of trial only some 10% of Pullman's salaried foremen were black, a figure which is substantially below that expected from the labor market — which ranges from 25 to 35% black, depending on the age group and area selected — or from Pullman's own work force — which ranges from approximately 45 to almost 50% black, depending upon the time selected. As Teamsters indicates, however, such statistics may be the result of the pre-Act discrimination and hence may be "rebutted" by data pertinent to the employment decisions made during the period covered under the EEOC charge. A summary of these promotions is given below:

Years	Promotions	Blacks
1967-68	17	2 (12%)
1969-70	18	4 (22%)
1971-72	8	2 (25%)
1973-mid '74	20	6 (30%)
mid '74-Jan. 77	12	4 (33%)
	75	18 (24%)

While these figures would compare favorably to expectations from the area labor market, at least after the first few years, such a comparison would be inappropriate. Likewise, a comparison with Pullman's total work force — showing a substantial disparity — would also be inappropriate. As Hazelwood School District v. United States, —— U.S. ——, 45 LW 4882, 15 FEP Cases 10 (June 27, 1977), makes clear, the group selected for comparison should be one which, when special qualifications are needed to fill particular jobs, possesses those qualifications.

It is clear from the evidence, if not from common sense, that special skills are needed by supervisors and that — to paraphrase another Supreme Court decision[16] — all workers are not "fungible" when it comes to selection of supervisors. The long-standing practice at Pullman has been to select salaried supervisors from the ranks of those who have demonstrated their abilities as front-line supervisors, i.e., as temporary foremen. This limitation, imposed by Pullman both before and after blacks became appointed as temporary foremen, is found by the court to be a bona fide occupational qualification under the evidence in this case. It moreover provides — subject to consideration of whether promotions to temporary foremen have

temporary foremen themselves been discriminatory against blacks — the appropriate group to which comparisons should be made under Hazelwood School District.

The opinion in Hazelwood School District, fn. 17, suggests the usefulness of the standard deviation as a measure of predicted fluctuations, citing the methodology employed in Castaneda v. Partida, —— U.S. ——, 45 LW 4302, 4306, n. 17. (March 23, 1977). When such a calculation is here made, it is found that the number of blacks appointed to salaried supervisory positions is less than two standard deviations from the number expected from the composition of temporary foremen for the period. Indeed for the latter eight years, the number of blacks so promoted is higher — though not statistically significant at $p < .05$ — than what was expected from the selection group. Certainly when taken in conjunction with evidence of a non-statistical nature as to the company's active and earnest efforts to promote blacks into the supervisory level — which are not mere "simple protestations" of a denial of discrimination[17] — it is clear, and the court so finds, that plaintiffs; *prima facie* showing with respect to salaried supervisors has been rebutted and that Pullman did not discriminate against blacks in such promotions in the time frame covered by the EEOC charges.

What about the promotions to temporary foreman, the practice by which Pullman has long met its sporadic needs for front-line supervision? The summaries presented by the company, DX-351 and DX-361, reflect that for the four most recent years the percentage of such promotions made to blacks has been some 31%. Here again, it is necessary to determine the group — or groups — to which the ratio of black promotions should be compared.

As was true with salaried foremen, it would be inappropriate to make a comparison to figures for the area labor market, a comparison which would give rise to no inference of racial

discrimination. And at first glance it would seem that a comparison could properly be made to the total work force at Pullman, which is 45-50% black. But that too, on analysis, would be inappropriate.

Promotions of temporary foremen are departmental in all essential aspects. They are made according to the needs of the individual departments. They are made by the supervisory personnel in that department. They are made from the employees working in that department.[18] The only involvement in the process by non-departmental personnel is the regular review by the Contract Compliance Officers — one black and one white — to assure that racial discrimination has not occurred.

The restriction of such temporary promotions to persons working in the department is a bona fide occupation qualification, justified by business necessity, under the evidence in this case. It is most appropriate in this case to analyze the temporary promotions on a departmental basis and to base expectancies on the composition of workers within the department. From the evidence in this case, principally DX-282 and DX-334[19], it is possible, as the court has done, to tabulate the departmental promotions, the blacks actually appointed, and the number of expected black appointments.

Promotions to Temporary Foreman
1967 through May 1974

Department	Promotions	Blacks (exp.)	Blacks observed
Air Brake Pipe	3	(0)	0
Boiler House	0	(0)	0
Die and Tool, IAM	33	(1)	0
Die and Tool, CIO	0	(0)	0
Forge	6	(2)	1
Inspection	5	(0)	0
Janitors	0	(0)	0
Lumber Stores	0	(0)	0
Maintenance, IAM	17	(2)	0
Maintenance, CIO	47	(9)	13
Misc. Stores	12	(6)	5
Mobile Crane	0	(0)	0
Paint and Shipping	27	(14)	16
Plant Protection	0	(0)	0
Power House	0	(0)	0
Press	2	(1)	0
Punch and Shear	8	(6)	3
Railroad	6	(2)	1
Steel Construction	12	(9)	11
Steel Erection	57	(41)	41
Steel Misc.	36	(32)	29
Steel Stores	27	(20)	15
Template	3	(0)	0
Truck	0	(0)	0
Welding	149	(22)	11
Wheel and Axle	4	(1)	0
Wood Erection	12	(7)	3
Wood Mill	0	(0)	0
	466	(175)	149

The calculation of the expected number of black promotions was done by multiplying the number of such promotions in a department during a given month (or quarter) by the percentage of blacks working in the department that month (or quarter), then adding the products so obtained over the 89 month period, and then rounding the sum to a whole number. As to the two largest departments — Welding and Steel Erection — the black percentage was determined in a slightly different manner: in the Welding Department, the figures were the black percentage of welders that month (or quarter); and in the Steel Erection Department, the figures were the percentage of blacks working that month (or quarter) who were qualified as either Riveters, Assemblers, or Heaters. This limitation was thought appropriate because it is clear—and the court so finds—that only Welders would be qualified to act as temporary foremen in the Welding Department and only persons with experience as a Riveter. Assembler or Heater would be qualified to act as temporary foremen in the Steel Erection Department.

Similar restrictions as to prerequisite jobs needed for promotion to temporary foreman could be determined for many of the other departments. For example, it is clear that only a full Millwright has the necessary qualifications to be temporary foreman in the Maintenance (IAM) Department: and, if such a restriction had been utilized, the chart would have reflected no expected black promotions (rather than the two shown). The court's study of the departments, while not attempting to fix the actual number, does indicate that the expected number of black promotions shown on the chart is overstated and is closer to the actual number of black promotions.

As was noted in the earlier decision, a greater number of blacks than whites have turned down offers of such promotions. The data on these refusals available to the court — for the

1971-73 period — can be used to make rough projections for the entire period.[20] The indications, is that, for every 30 whites who accepted, 32 would have been offered the promotion and that, for every 30 blacks who accepted, 36 would have been offered the promotion. When a chart such as that shown above is constructed using the projected number of offers of promotion, it shows that some 35% of the total offers would presumably have been made to blacks, in comparison to the expected figure of 38% — a difference of less than two standard deviations.

The greatest difference between observed and expected results shown on the chart — both in absolute numbers and standard deviations — is in the Welding Department, where there is an "under-appointment" of 11 blacks, or some 2.54 standard deviations from the expected result. And, indeed, exclusive of the figures for the Welding Department, the overall actual appointments of blacks (and not merely the projected job offers, as described in the preceding paragraph) would be less than two standard deviations from the expected number. Inquiry must certainly be made whether as to the Welding Department case of "liability" has been established respecting such promotions — i.e., such as would create a presumption of discrimination in favor of individual class members in the department, subject to additional proof as a "second" phase of the case.

A major reason for the large disparity in promotions in the Welding Department is that during the first two years of the period involved — 1967 and 1968 — there were 24 such promotions and not a single black was selected. The problem was that the black welders had only a few months of experience as welders and did not possess the skills needed to act as foremen in the Welding Department. Nor was this the result of any post-Act discrimination against them — rather, as indicated in the prior decision, the company has during the applicable time period actively sought and trained blacks to be welders and — to prevent employment of unqualified welders, black or white — has adopted procedures to verify qualifications.[21]

The restriction of temporary foremen in the Welding Department to those with adequate skills and experience — and who were willing to accept such appointments[22] — was a bona fide occupational requirement for such promotions and was shown to be justified by business necessity. As Teamsters makes clear, a company is not limited in the "liability" phase of a case merely to statistical evidence. See 45 LW at 4515, n. 46, 14 FEP Cases at 1529. Here the company not only has countered the plaintiffs' *prima facie* showing with other statistical evidence, undercutting inferences drawn from plaintiffs' statistics, but perhaps even more importantly has provided non-statistical information as to its promotion of black welders to temporary foreman positions, both as to its general policies and as to individual decisions. The active efforts to upgrade blacks in the Welding Department, both to welder positions and to temporary foreman, together with the regular reviews undertaken by the Contract Compliance Officers to assure lack of discrimination and to encourage black promotions, are not mere window-dressing. When both the statistical data, fairly evaluated, and the non-statistical evidence are fairly considered, the court is convinced, and so finds, that the plaintiffs' *prima facie* showing of discrimination in promotion of temporary foremen in the Welding Department has been rebutted and that no such discriminatory practice existed subsequent to 1966. The same finding is made with respect to promotion of temporary foreman in the other departments.[23]

III. Summary

The court finds and concludes that the company did not in violation of the anti-discrimination laws follow any practice or policy after 1966 which discriminated against blacks in the assignment of employees to departments or in the selection of supervisory personnel. Nor has any violation of such laws been

shown to have been committed by the unions. Judgment is due to be entered in favor of the defendants as to all issues in this case.

Judgment

In accordance with the findings of fact and conclusions of law contained in the Memorandum of Opinion filed concurrently herewith, judgment is hereby entered in favor of the defendants. Each party shall bear its own costs.

SWINT III - Footnotes

[1] The Appellate court affirmed this court's rulings (a) that there had not been shown discrimination in the assignment of work among employees working the same job class; (b) that the failure to post job vacancies had neither discriminated nor perpetuated the effects of past discrimination; and (c) that the individual claims of discrimination by the plaintiffs had not been established. While the Fifth Circuit affirmed the ruling respecting "posting", it however held that the court should reconsider the question in the light of whether such relief was required to make efficacious the transfer rights of any who had been discriminated against.

[2] A third decision announced by the Supreme Court on the same day should also be noted. The body of the opinion in East Texas Motor Freight System, Inc. v. Rodriguez, — U.S. — , 45 LW 4524, 14 FEP Cases 1505, indicates that the instant case should not have proceeded as a class action at all. However, this case was certified before trial as a class action, was tried as a class action, and involved representative plaintiffs who had not at the time lost their individual claims. As footnote 12 of the Rodriguez opinion suggests, such facts make this case distinguishable from that in Rodriguez. Also see Franks v. Bowman Transportation Co., 424 U.S. 747, 752-57, 12 FEP Cases 549, 551-553 (1976).

[3] While finding that there had been past discrimination in assignments to nine departments, the trial court concluded that, in view of transfer opportunities given blacks in 1972, the effects thereof were not being perpetuated by the seniority system.

[4] Evidenced as the practices prior to the effective date of Title VII or not the subject of timely EEOC charges would, of course, still be relevant *circumstantially* as to the practices challenged by timely EEOC charges.

[5] So far as the court has been able to determine from the evidence the first EEOC charge against Pullman was one filed by a Commissioner in January, 1967. This charge, however, was limited to the alleged practice of segregated facilities and, even with liberal rules of interpretation, could hardly be held reasonably related to attacks on departmental or job assignments or on the seniority system. The next charge, also by a Commissioner, was filed on March 27, 1967, and, by questioning the hiring and promotion practices of Pullman, is susceptible to the interpretation that it related also to assignment and transfer matters. Actually it is doubtful that this Commissioner's charge should be used as a date-designator since the instant private

lawsuit grew out of later filed individual charges. The earliest charge filed by one of the plaintiffs, on October 15, 1969, did not raise challenges to the assignment, transfer, or seniority policies, although it was amended on several occasions prior to the issuance of the right-to-sue letter. The first private charge directly bringing into question the company's assignment policies was apparently filed on May 11, 1970. To give plaintiffs' the benefit of the doubt, the court has in this opinion used the earliest possible date, i.e., 90 days before the March 27, 1967, Commissioner's charge, while nevertheless having substantial reservations that such a date is proper.

[6] Read literally, the issue specified in the pretrial order — whether the seniority system perpetuates the effects of past discriminatory departmental assignments — would not under the recent Supreme Court decisions state a material issue under Title VII. However since this implicitly assumed as an issue whether there had been discriminatory assignments, it adequately indicated the issue which this court must now resolve and, indeed, abundant evidence was presented at the trial as to the employment practices of the company up to the time of trial itself.

[7] Discrimination against blacks, a reality for many years at Pullman prior to Title VII, was accomplished through the vehicle of reserving many of the "better" jobs for whites. The departmental seniority system was not adopted with the intent or purpose of protecting whites against blacks.

[8] Illustrative of this conclusion is the fact that on a relatively recent vote by the union — approximately half of whose members are black — opposition to a merger of several departments for seniority purposes was unanimous.

[9] Of course there have been the typical disputes processed through the grievance procedures claiming that the company deviated from the seniority rules. As noted in the original opinion, fn. 24, the plaintiffs have not actively contended that the rules have been discriminatorily applied.

[10] The problem is compounded by the fact that the 1972 changes give remedial relief to blacks whose mistreatment, pre-dating Title VII, was not a legal wrong.

[11] Unlike Teamsters, the present case does not involve any claim of discrimination in the initial hiring decisions, and for good reason. See 539 F.2d at 83, n. 10, 13 FEP Cases at 608. Reference to census data is of doubtful value to the case at hand.

[12] Also see 539 F.2d at 94, n. 40, 13 FEP Cases at 618 (*prima facie* case not established merely by proving some departments do not approximate racial makeup of plant).

[13] In so ruling, the court is not however saying that racial considerations were the sole determinant of assignments. The court rather is impressed, particularly in view of the evidence presented by the company after remand, that bona fide job qualifications played the decisive role in assignments to many of the key jobs and departments — that, for example, whites were assigned as welders and to craft jobs because, with only very rare exception, no black hires possessed the requisite experience and skills for those jobs. There were, however, a few such exceptions, where aparently qualified blacks were denied assignment for what the court must conclude was in furtherance of the job-segregation practice — and, though few in number, such persons should have the benefit of a presumption of liability *if* they had cognizable claims (which they do not, under Teamsters) under Title VII. The co-existence of a non-discriminatory reason for the majority of assignments (the lack of qualifications) would not, in short, have destroyed the plaintiff's *prima facie* showing on behalf of the class, but would rather have constituted defensive matter to be shown in responding to individual class members' claims at subsequent hearings.

[14] See the section entitled "Segregation Claims" in the initial decision, 8 EDP at p. 5989, 11 FEP Cases at pp. 951-952. It is here appropriate to respond to the Fifth Circuit's comment that, in dealing with the lag time involved for blacks to exercise the rights afforded by opening jobs to them, the district court had "inexplicably discussed completely different figures from those shown in the record." See 539 F.2d at 96. 13 FEP Cases at 620. This court had, in its footnote 31, stated that "the 1973 study by plaintiffs showed that 19.9% of the whites held positions on the roster above JC 10, as compared with only 12.2% of the blacks." and the Fifth Circuit in its opinion said, "plaintiffs' exhibits show that in 1973 74.1% of blacks still remained assigned to job classes lower than 8 while 80.7% of all whites were assigned to job classes over 10." This court did make an error of addition from PX-55, erroneously calculating the number of whites above JC 10 as being 150, when the correct number was 160, and the corresponding division should have been 21.2% rather than 19.9%. Its calculation of the percentage of blacks in such positions, 12.2%, was correct. Actually, the Fifth Circuit made a greater miscalculation, for the percentage of whites assigned to job classes over 10 was not 80.7% but rather the 21.2%.

[15] This court considered plaintiffs' statistics deficient in failing to take account (a) of the higher rate of functional illiteracy among black employees and (b) of the time required for blacks, previously discriminated against, to obtain skills useful to supervisors. The Fifth Circuit held that these two factors would be pertinent in evaluating the statistics only if, *inter alia,* the court found that literacy and acquisition of the job skills were bona fide occupational qualifications — a finding which this court had not made.

[16] See Mayor v. Educational Equality League, 415 U.S. 605, 620(1974).

[17] Cf. Castaneda v. Partida, 45 LW at 4306, n.19.

[18] Of the 415 monthly promotions reported from January 1969 through May 1974, 403 — or 97% — were appointments of a person then in the department. Of the 13 "inter-departmental" temporary promotions, virtualy all involved an assignment to closely related work, e.g., an Inspector to the department in which he performed his duties or an Assembler from one department being assigned as foreman for assembly work in another department.

[19] DX-282 details the department promotions by month from January 1969 through May 1974. DX-334 provides the essential information on a quarterly basis back to January 1967.

[20] Prior to 1971 the turn-down rate by blacks was higher, and subsequent to 1972 the rate was probably lower. The 1971-73 figures should be reasonable approximation for the period as a whole.

[21] Plaintiffs assert that the requirement of either training or outside experience was a barrier designed to deter blacks. The court is persuaded that, to the contrary, it was both a valid requirement and was indeed intended to rpevent on-the-job training of unqualified whites. The requirement was not put in until black employees were given an opportunity to demonstrate their skills as welders.

[22] Turn-downs by blacks in the welding department were a significant factor.

[23] This is not to say that at no time has any black been the victim of discrimination in the selection of temporary foremen. On some isolated occasion — although the court was not shown this in the evidence -- there may have been such an incident. For the plaintiffs to prevail at the "liability" phase of the case, thereby creating a presumption of discrimination with respect to individual class

members, there must however be established a policy of practice of discrimination. It may be noted that general notice of the trial of the case was given, with the invitation to class members to present evidence if they chose. It is unnecessary for the court to determine at this time whether an individual class member could, although unaided by any presumption of discrimination, still present by other litigation a claim of discrimination, for example, as to a supervisory position.

SWINT IV

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, A Division of Pullman Inc., et al., No. CA 71-P-0955-S, October 11, 1977

POINTER, District Judge: — By motions timely filed on July 15, 1977, plaintiffs seek to alter or amend the judgment of July 5, 1977, or, in the alternative, a new trial.

Plaintiffs first ask that the court produce the chart used by it in arriving at certain conclusions about departmental assignments and identify the source documents relied upon. As to the latter request, the information was simply that derived from the annual seniority lists themselves (PX-4 et seq.), looking to those new employees in each department who "survived" long enough to be listed on the succeeding June 1st roster. This is the same approach as was used in the original decision in reconstructing the June 1, 1965, seniority list. It is unnecessary for the court to reproduce the tabulation of such assignments by race, department, and year, as the same information is readily available in the exhibits on file.

Plaintiffs next assert that the court erroneously used a period of 90 days prior to filing of an EEOC charge as the commencement date for evaluating evidence concerning departmental assignments allegedly in violation of Title VII. The argument is that the 1972 amendment to Title VII, extending the time for filing charges to 180 days, has generally been given retroactive effect. See, e.g., Davis v. Valley Distributing Co., 522 F.2d 827, 10 FEP Cases 1473 (CA9 1975). Plaintiffs are probably correct. While this court's use of the 90-day period followed the opinion in United Air Lines Inc. v. Evans, 431 U.S. 553, 45 LW 4566, 14

FEP Cases 1510 (May 31, 1977), that case did not actually constitute a holding against retroactivity of the 1972 amendments. Evans rather involved a situation in which the charges would have been stale under either period of time.

As noted in the July 5th opinion at fn. 5, it is doubtful that plaintiffs can take advantage of the Commission-initiated charge of March 27, 1967. However, even if this be proper and if the plaintiffs have the benefit of a period of 180 days, the ultimate result stays the same. For the court nevertheless remains persuaded under the evidence that there was no practice of discriminatory assignments to departments after September 28, 1967, anymore than there was after December 27, 1967.

Plaintiffs argue that this court was prohibited by the mandate of the Fifth Circuit from reconsidering the question of whether there had been discriminatory assignments. To the contrary, however, it is clear that this court was in the remand order being directed to reevaluate from a new perspective whether racially discriminatory assignments had occurred, with this court to determine afresh the inferences that should be drawn from the evidence presented.

Finally, plaintiffs say that they should be given the opportunity to present additional evidence to demonstrate the invalidity of the seniority system in the light of International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 45 LW 4506, 14 FEP Cases 1514 (May 31, 1977).[1] This case was prepared for trial — as shown by the limitation of issues recited in this court's original opinion and in the appellate court's opinion — on the theory, then well recognized in this circuit, that a violation of Title VII could be shown by proof of a neutral seniority system which perpetuated the effects of pre-Act discrimination. Trial was conducted on such a limitation of issues, with consequent inattention by plaintiffs to possible evidence showing the seniority system to have been instituted or maintained contrary to Section 703(h) of the new Civil Rights Act of 1964.

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1 All footnotes for this section appear at the end of this opinion, p. 181a.

Somewhat similar situations have been recently considered by the Fifth Circuit. In each it was held that the opportunity should be given for presentation of further evidence in the light of Teamsters. See Sabala v. Western Gillette, Inc., 559 F.2d 282, 15 FEP Cases 1809 (CA5 No. 74-2711); Sept. 16, 1977); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (CA5 No. 75-2176, at p. 6031; Sept. 19, 1977). The concern that a final decision affecting such important interests, including those of represented class members, be based upon the true facts — rather than upon those presented under what now appears to have been an erroneous interpretation of the law by all parties and by the court — leads this court to the conclusion that a new trial should be granted. The new trial will, of course, be for the limited purpose of receiving new evidence from plaintiffs and defendants upon the issue of the validity of the seniority system under Section 703(h) of the Civil Rights Act of 1964.

In making this ruling, the court would express the caveat that not all previously tried employment discrimination cases are due to be re-opened — that this particular case happens to be one which was under submission when Teamsters was decided and which had been tried at a particular point in time when all concerned acted under what, as it turned out, was an erroneous view of the law.

Order

In accordance with the accompanying Memorandum of Opinion, it is ordered that a new trial be granted, limited, however, to presentation of additional evidence relevant to the issue of the validity of the seniority system under Section 703(h) of the Civil Rights Act of 1964. The parties may proceed with further discovery as may be appropriate to that end.

SWINT IV - Footnotes

[1] Plaintiffs say they were unaware that this court was withholding judgment in anticipation of the Teamsters case; and the court has no reason to doubt this, acknowledging that it did not tell the parties it was doing so. However, it should be noted that, in presence of plaintiffs' counsel, the court was requested by the defendant union to await the outcome of such decisions, with union's counsel at the time providing the court with a copy of the transcript of arguments made before the Supreme Court.

SWINT V

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, et al., No. 71-P-0955-S, May 5, 1978

POINTER, District Judge:

MEMORANDUM OF OPINION

(Pullman-Standard V)

An understanding of the issue now before the court — involving the validity of the seniority system at Pullman-Standard under Section 703(h) of the Civil Rights Act of 1964 — requires some consideration of the history of this litigation:

(1) Pullman-Standard I. In September 1974, following a sixteen day trial, this court held, with minor exceptions, against the plaintiffs' individual and class claims of discrimination. *Inter alia,* it found Pullman's departmental seniority system not violative of Title VII, basing that decision in large part upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignments to most of the departments. See 8 EPD ¶9720, 11 FEP Cases 943

(2) Pullman-Standard II. In August 1976, the Court of Appeals remanded the case for reconsideration on certain issues, including that relating to the attack on the seniority system. The court emphasized that discrimination in assignments could be established without regard to the relative desirability of the various departments — i.e., that

there is no "separate but equal" doctrine in employment situations. See 539 F.2d 77, 13 FEP Cases 604 (CA5 1976).

(3) Pullman-Standard III. In July 1977, after receiving additional evidence, this court again ruled against the plaintiffs' claims. While finding, under the standards outlined by the appellate court, that there had been discrimination in departmental assignments, it determined that such assignments had pre-dated the time period covered by EEOC charges. Concluding that the evidence had shown the seniority system to be valid under Section 703(h), the court found the claims barred under International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977). See 14 EPD ¶7815, 15 FEP Cases 144.

(4) Pullman-Standard IV. In October 1977, on timely motion by the plaintiffs, the court reopened the case for additional evidence relating to the validity of the seniority system under Section 703(h). See 15 EPD ¶7993, 15 FEP Cases 1638.

In January 1978 further evidence in the form of testimony *ore tenus,* depositions, interrogatories, and exhibits was presented to the court. The parties, having rested,[1] were then directed to file post-trial briefs.

A. Burden of Proof.

According to the company's brief, the plaintiffs have the burden of showing invalidity of the seniority system. In the sense that the plaintiffs had the burden of "going forward with the evidence" at the most recent hearing, this is certainly true; for at that time, based on the prior state of the evidence, both this court and the Fifth Circuit had adopted various findings supporting the validity of the seniority system.

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1 All footnotes for this section appear at the end of this opinion, pp. 203a to 206a.

Imposition of the ultimate "burden of persuasion" is, however, another matter. The defendants could, with considerable logic, argue that Section 703(h) is interrelated with Section 703(a) in delineating an "unlawful employment practice", Frank v. Bowman Transportation Co., 424 U.S. 747, 758, 12 FEP Cases 549, 553 (1976), and that therefore the plaintiffs should have the burden of establishing inapplicability of Section 703(h).

A contrary conclusion is here reached by the court — namely, that where the plaintiffs establish a disparate impact resulting from a seniority system (by reason of prior discriminatory practices), the defendants, as in the nature of an affirmative defense, have the burden to show that the seniority system in question was bona fide and that the differences caused thereunder were not the result of any intent to discriminate on the basis of race or color. The situation is analogous to that involving use of ability tests under this same Section 703(h), where the employer is held to have the burden to demonstrate applicability of the exclupatory provision of Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"); also see Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 10 FEP Cases 1181, 1190 (1975); Teamsters, supra, 431 U.S. at 360-61 n.46, 14 FEP Cases at 1529 (1977) ("the employer's burden is to provide a non-discriminatory explanation for the apparently discriminatory result").

B. Seniority System.

The seniority system under attack in this case has its essence in the 1954 company-wide collective bargaining agreement between Pullman and the United Steelworkers. Under that agree-

ment, seniority was measured by length of continuous service in a particular department — there were 26 such USW departments — and was exercised in the event of increases and decreases of forces in competition with all other employees in that department. There were no lines of promotion or progression in any department and, indeed, seniority — again, departmental age — was not formally recognized for promotional purposes until the 1956 agreement. Employees transferring from one department to another were treated as "new" employees in the department to which transferred (i.e., no carryover of seniority) and, with limited exception for those transferring at the request of the company or electing transfer in lieu of lay-off, also lost their seniority in the "old" department.

There is an additional component — not directly at issue in this litigation[2] — to the seniority system at the Bessemer plant; namely, the existence of two additional seniority units, or departments, represented by the International Association of Machinists and Aerospace Workers. Since 1944, the collective bargaining agreements with the IAM have provided for seniority based on length of service within the particular job classification in the seniority department, without opportunity for carryover of seniority in the event of transfer from other occupations or departments, whether represented by the IAM or not.

The seniority system in effect at Bessemer in 1954 remained virtually unchanged throughout the next eighteen years of collective bargaining between the company, the USW, and the IAM. Then, in 1972, as outlined in prior opinions, provision was made in an OFCC agreement to permit black employees hired before April 30, 1965, to transfer from predominantly black departments or to transfer to predominantly white departments, in either case with carryover of seniority. See Pullman-Standard II, 539 F.2d at 84 nn.15-16, 13 FEP Cases at 609 (CA5 1976). The restriction against carryover of seniority on departmental transfers continued in effect as to such black employees

when transferring from a "mixed" department to another "mixed" department, as well as to black employees hired after April 30, 1965, and to all white employees. Rate retention (or "red circling") is not afforded for any transferring employee.

For a number of years — until the arbitration decision in March 1965[3] — there was an informal custom at the plant of treating certain jobs as "white only" and others as "black only". This practice in turn, as has been previously found (see Pullman-Standard III), caused decisions respecting assignments to departments throughout the plant to be infected during that period with racial considerations. According to the plaintiffs, the effects of this discrimination in departmental assignments[4] have been perpetuated by the seniority system — a system which determines employment rights on the basis of departmental age and which, even with the 1972 changes, provides barriers to departmental transfers. The plaintiffs deny that the system meets the requirements of Section 703(h), taking issue with the company as to its bona fides and purposes. The applicable legal principles are those stated in Teamsters, supra, as explicated by the Fifth Circuit in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (1977).

(1) Neutrality of System.

One of the factors to be considered, as a part of the "totality of the circumstances in the development and maintenance of the system," is whether it operates to "discourage all employees equally from transferring between seniority units." James, supra, 559 F.2d at 352, 15 FEP Cases at 861. In the case *sub judice*, as in Teamsters, the seniority system — at least as it existed prior to 1972 — was facially neutral and, certainly with respect to the facets attacked (i.e., use of departmental age and loss of seniority on transfer), was applied equally to all races and ethnic groups. As this court noted in Pullman-Standard I — and subsequent evidence does not change the court's view — the

departmental seniority system was applied in a uniform manner, regardless of race or color, and the limited number of interdepartmental transfers granted were handled in a fair and non-discriminatory manner. 8 EPD at 5997 n.24, 11 FEP Cases at 949. While many of the grievances and other complaints made by blacks include charges of racial discrimination, these charges are not substantiated by the evidence. See, e.g., Pullman-Standard I, 8 EPD at 5998-99 nn.39, 41 & 50, 11 FEP Cases at 955-956, 958.

To the extent the system "locks" employees into a department and discourages transfers, it does so equally for both white and black — that is, it did so until 1972. Since the 1972 OFCC agreement, a substantial portion of the black employees are given favored treatment by being permitted to transfer their accumulated seniority from certain departments or into certain departments. The plaintiffs hardly have standing to challenge this solitary exception to the principles of neutrality found in the seniority system.

The Supreme Court noted in Teamsters, 431 U.S. at 356, 14 FEP Cases at 1527, that the overwhelming majority of employees discouraged from transferring to line-driver jobs were white. Emphasizing that fact, one might argue that a no-transfer seniority rule should be reviewed for its quantitative impact upon different groups of employees. Such an analysis may, indeed, be useful in the process of evaluating circumstantial evidence. If, to take an extreme example, a seniority rule were shown to penalize all blacks and no whites, the inference that the rule was racially motivated would seem compelled. Where, however, as here, a rule affects significant numbers of both white and black employees — and does so in an identical manner — it would be a misreading of Teamsters, in this court's view, to determine "neutrality" on the basis of its quantitative effects. Indeed, according to n.24 of the decision of the court of appeals in Teamsters, 517 F.2d 299, 312, 11 FEP Cases 66, 75

(CA5 1975), it appears that 95% of the non-white employees were affected by the rule precluding transfer to line-driver jobs, whereas only 59% of the whites were so affected. As noted in the Supreme Court opinion, 93% of the black and Spanish-surnamed American drivers were not line drivers, and only 38% of the white drivers were not line drivers. 431 U.S. at 342 n.23, 14 FEP Cases at 1521-1522. The reference by the Supreme Court to the numerical impact of the rule should be understood as providing additional support, and not as a *sine qua non*, for its decision — particularly since it apparently accepted the lower court's findings that non-whites had suffered the most from the rule. See 431 U.S. at 344, 349-50.

By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could however attempt to measure the relative effect of the no-transfer rule on white and black employees, i.e., to determine which group was the more discouraged from transferring. It may well be that a somewhat greater impact was felt by blacks than whites, although — as indicated in the chart considered in Pullman-Standard I for a somewhat different purpose and subsequently analyzed in Pullman-Standard II — this conclusion is by no means certain. In any event, the rationale of the Fifth Circuit in Pullman-Standard II indicates that such a study of relative economic desirability would be inappropriate. If one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite — equality or neutrality — without reference to such desirability. Under this approach, it is clear that the per-1972 no-transfer rule applied equally and uniformly to all employees, black and white, and that, given the approximately equal number of employees of the two groups, it was quantitatively neutral as well.

(2) Rationality of Seniority Units.

A second factor under Teamsters, is, in the words of the Fifth Circuit, "whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice)." James, supra, 559 F.2d at 352, 15 FEP Cases at 861. In so stating this factor, the appellate court seems to be suggesting that separate seniority units may be more acceptable if in the same bargaining unit than if in different bargaining units, in which latter situations one should make further inquiry as to rationality and industry practice. It is doubtful that such a proposition was intended by the circuit; at least there appears to be nothing in Teamsters to support such a principle, and it would logically seem that, if anything, greater scrutiny should be given to separate seniority units within the same bargaining unit than to ones in different bargaining units. It may well be that — in discussing the restriction against transfers to line-driver jobs as involving separate bargaining units, which was itself viewed as rational, in accord with industry practice, and consistent with NLRB precedents — the Supreme Court was not proposing a standard for Section 703(h), but was rather highlighting facts which demonstrated the bona fides of the seniority rule there in question.

In any event, this court is bound to follow the rulings of the Fifth Circuit. A solution — one which is in keeping with the admonition to use a "totality of circumstances" approach — is to inquire into rationality and industry practice not only when seniority units are in different bargaining units, but also when they are in the same bargaining unit.

The division of the plant's work force into twenty-eight separate seniority units — 26 USW units and 2 IAM units — has remained essentially unchanged since 1954.[5] While this at first glance appears to be an unusually large number of departments,

it must be viewed in the context of the diversity of operations at the plant, the extreme fluctuations in employment levels,[6] and — what is particularly significant — the opportunity to use seniority within the unit for any job without the barrier of any lines of promotion. Given these facts, the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumping or displacements, highly inefficient performance, or excessive grievances over ability factors — or all of them.[7]

One can, of course, raise questions about particular units and can ask whether other configurations would, from the later perspective of the courtroom, make more sense. For example, the plaintiffs note that the Steel Miscellaneous department owes its separate existence — since 1952 — to no apparent reason other than the fact that, prior thereto, there were two work gangs in the Steel Stores department. Whether it is rational to have separate seniority units based upon the fact that the two groups worked under different foremen may be debated; but it should be noted that this separation came about as a result of collective bargaining at which blacks, as well as whites, were representing the union, and the two units created had roughly comparable racial compositions. On the other hand, while the company's apparently unilateral creation of a separate Inspection department in the late 1940's, drawing the inspectors from the various operating departments into a separate unit, can be seen as having a racial impact (all the inspectors were white)[8], this change was certainly rational — removing them from responsibility to the very persons whose production they were being called upon to inspect.

In context, and taken as a whole, the seniority units at Pullman's Bessemer plant constitute a rational structure. They are, moreover, consistent with practices which were at the time generally followed at other unionized plants throughout the

country, at other companies in the same industry, and indeed at Pullman plants located outside the South where race was presumably not a potential consideration.

As stated by the Supreme Court,

"In addition, there is not reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. *** The legislative history contains no suggestion that any one system was preferred."

Teamsters, supra, 431 U.S. at 355 n.41, 14 FEP Cases at 1527. Indeed, as the company has established — by publications of the Department of Labor, arbitration awards, decisions of the War Labor Board, various collective bargaining agreements, and contemporaneous studies made by it at the time of contract negotiations — seniority by departmental age such as found at Bessemer was the modal form of agreements generally, as well as with manufacturers of railroad equipment in particular.[9]

The number of separate departments found at Pullman's Bessemer plant is less than that (40 departments) at American Car and Foundry's plant at St. Charles, Missouri, and than that (29 departments) at Eastern Car Company's plant in Nova Scotia. The same number of departments (28) are found at Pullman's plant in Butler, where less than 1% of the employees were black; and the lesser number of departments found at Pullman's plant in Hammond, also having a small percentage of black employees, should be reviewed in the light of the more limited operations there conducted.[10]

There are, as would be expected, differences between the departmental configurations at Pullman's three plants; and some of these are emphasized by plaintiffs as indicating the existence of racial considerations at Bessemer.[11]

Plaintiffs note that the Truck, Wheel and Axle shops at Hammond are in a single department, while at Bessemer the Truck shop (which remained all-black until 1968-69) and the Wheel & Axle shop (racially mixed) are separate departments. Although any overlap of occupational titles in the two departments is insignificant, it may be - the evidence is not clear - that there is a sufficiently close relationship between the jobs in the shops that they could be in the same seniority unit, rather than in different ones. It should, however, be noted that the two shops were treated as separate departments before any unionization or seniority,[12] that they were certified by the NLRB for inclusion in separate representational units, [13] and that for a time they were covered under separate collective bargaining agreements with different unions. Moreover, when the company proposed merger of these and other departments, the proposal was unanimously rejected by the union at a meeting where the majority in attendance were black.[14]

Plaintiffs likewise complain that at Butler and Hammond there is a separate Electrical & Crane department, while at Bessemer cranemen are in more than one department. Here again, cranemen at Bessemer were not in a single department prior to unionization and seniority (indeed, they were in five separate departments), the electricians were certified by the NLRB to be in a different bargaining unit, and for a period of time the two groups were covered under separate collective bargaining contracts with different unions. When consideration was given in the 1950's to possible formation of an Electrical & Crane department at Bessemer, company officials at Butler advised against the practice based on their actual experience. Rejection by the company of union proposals to merge a small

seniority unit having some of the cranemen (the Mobile Crane department) into either the Railroad department or the Maintenance department appears to have been based on business considerations, not racial ones - for all three of the departments were racially mixed.

A primary facet of plaintiffs' attack is their challenge to the two Die & Tool departments and the two Maintenance departments at Bessemer. No similar situation exists at Pullman's Butler and Hammond plants, and indeed there were no such divisions at Bessemer prior to unionization and seniority. The key here is that responsibility for this situation cannot properly be placed on either of the real defendants - the company or the USW - and that, moreover, this circumstance does not diminish the bona fides of the seniority system under attack - that between the company and the USW.

The existence of these divided departments is due to actions of the NLRB in 1941, when it - at the request of other petitioning unions - divided the plant into three representational units for election purposes. This was done over the opposition of the predecessors[15] of the USW, which sought to represent all production and maintenance employees. The company properly adopted a "hands-off" attitude on formulation of election units. Three separate election units were formed by the NLRB, with the International Brotherhood of Electrical Workers gaining representation status (over the USW) for two small departments, with the IAM gaining representation (over the USW) for five other departments, and with the USW gaining representation (over the Federal Labor Union) for the bulk of the employees. The unit formed by the NLRB as to which the IAM gained recognition was one which included certain positions in the Die & Tool and Maintenance departments considered by the NLRB as involving craft and craft-related jobs, but which omit-

ted other positions in those departments, they being in the unit for which the USW gained recognition. Hence - and it is difficult to understand how the company and the USW could have legally done otherwise - it resulted that there were two Die & Tool seniority units, each subpart being represented by a different union. The separation into different bargaining units was not merely, as in Teamsters, "consistent with National Labor Relations Board precedents," 431 U.S. at 356, 14 FEP Cases at 1527; it was rather required by a specific decision of the NLRB and the outcome of the elections.

Much effort is expended by the plaintiffs to show that the NLRB erred in determining which occupations should and should not have been treated as craft and craft-related jobs and that the result of that decision was to create for a few years[16] all-white IBEW bargaining unit and to establish after a few years[17] an all-white IAM unit. The collateral attack on the NLRB decision by plaintiffs in this litigation, filed more than twenty-five years later, must fail, if for no other reasons, because the real defendants - the company and the USW - are not chargeable with responsibility for those events and because such matters do not impair the validity of the seniority system to which they did agree. If there was any industry practice to combine positions represented by different unions into the same seniority unit, this court was certainly not presented with evidence to that effect.

Also criticized by plaintiffs are certain other departments at Bessemer - such as the Inspection, Boilerhouse, Railroad, and Janitors[18] departments - seeing the existence of such departments as frustrating opportunities for black employees. These same departments, however, are likewise to be found at either the Hammond or Butler plants, or both. Indeed, putting aside those departments whose existence was incident to the recognition of three separate unions,[19] the configuration of departments at Bessemer is quite similar to that at Pullman's Butler plant. There are, in fact, two instances where broader seniority

is provided at Bessemer than at Butler - Butler's Punch and Shear departments being combined at Bessemer into a single department, as is also true with respect to the Paint and Shipping Track departments.

Individual differences in the departmental structures at Pullman's Bessemer and Butler plants, such as they are, do not establish that either is irrational or inconsistent with industry practices. While it is appropriate to view, as this court has done, the systems under a microscope, the ultimate objective should be to comprehend the gestalt of the system. Here, from either perspective, the court finds the departmentalization at Pullman to be rational, in accord with the industry practice, and consistent with NLRB policies. As stated by the Supreme Court in Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39, 31 LRRM 2548 (1953),

"A wide range of reasonableness must be allowed a statutory bargaining representative * * * subject always to complete good faith and honesty of purpose in the exercise of its discretion. * * * Variations acceptable in the discretion of bargaining representatives * * * may well include differences based upon such matters as the unit within which seniority is to be computed."

(3) Genesis of Seniority System.

Next the court must consider "whether the seniority system had its genesis in racial discrimination." James, *supra*, 539 F.2d at 352, 15 FEP Cases at 861. Taken from a factual finding in Teamsters, this factor, while ambiguous, is presumably not wholly dependent[20] upon a determination that racial discrimination had a causative relationship with the seniority system. It rather implies that consideration should be given to the extent of racially discriminatory practices at the time the seniority system came into existence.

In the case *sub judice*, two times of "origin" might be examined - in 1941 - 42, when union organizational efforts were finally successful and the first collective bargaining agreements were signed; or in 1954, when the seniority system under attack in this litigation became essentially fixed. Selection of the more appropriate date is not, however, critical under the circumstances of this case, for the evidence reflects similar practices at both periods.

Both in 1941 and in 1954, racial segregation was extensively practiced at the company's Bessemer plant, in the local union hall, and in the community as a whole. Most of the jobs at the plant were by custom treated as "white only" or "black only" - or, more accurately, as "white" or "colored". Bathhouses, locker rooms, and toilet facilities were racially segregated. Company records - including employee rosters, internal correspondence, records of negotiation sessions, lists of persons picketing - included racial designations. In 1941 some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated. The court can take judicial notice of the widespread extent of segregation in the community - in schools, transportation, public accommodations, et cetera.

Considering the apparent pervasiveness of such discrimination, one may naturally infer that related matters - such as a seniority system - must, even when facially neutral, have been the product of the same discriminatory animus. And yet, based on the very extent of such other forms of discrimination, it may well be that racial considerations were not involved - being "unnecessary" - in the development of a particular practice. Great care should be given in drawing the correct inference from such evidence, as has been illustrated in voter dilution cases where similar circumstantial evidence has been presented. See Taylor

v. McKeithen, 499 F.2d 893, 896 (CA5 1974); McGill v. Gadsden County Commission, 535 F.2d 277, 280-81 (CA5 1976); Nevett v. Sides, — F.2d —, slip op. 3373 (CA5 1978).

One of the few mutual and common ventures of blacks and whites at Pullman's Bessemer plant in 1941 - one which , due to laws of the United States and their enforcement by the NLRB, treated the two races as the same - was the unionization effort by the predecessor of the USW. The success of its drive for representation and recognition must be attributed in large part to the black workers, who constituted more than half of the election unit. In 1954, as was true in 1941 and in the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formulation of the policies and positions of the union - the local not being dominated by whites. While possessing some of the trappings taken from an otherwise segregated society,[21] the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations.

Although determined by collective bargaining, a seniority system may properly be viewed as the manifestation of a union objective, one which operates in opposition to and as a limitation upon the managerial powers sought by the company. This generalization is shown by the evidence to be applicable to the case *sub judice*, where, although certainly affected by the process of negotiation, the seniority system under attack is essentially the product of USW aims and policies. The use of departmental age for seniority purposes was adopted in the first 1941-42 contract at the request of the USW's predecessor. The return to departmental age in 1954, as a consequence of the first company-wide collective bargaining agreement, was in fact a

broadening of the seniority by "occupation-within-a-department" which had been adopted in 1947 at the urging of the USW local - indeed, at the request of a black member of that USW negotiating committee. Since 1954 the union has continued its support for departmental seniority and has rejected certain company efforts to merge departments for broader seniority.

The seniority system under attack had its genesis - whether viewed as being in 1941-42 or in 1954 - at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of colorblind objectives of a union which - unlike most structures and institutions of the era - was not an arm of a segregated society. Nor did it foster the discrimination - of treating certain jobs as being for one race or the other - which was being practiced by custom in the plant. Indeed, it was this very seniority system which, as a result of arbitration in 1965, provided the means for stopping that discrimination even before the effective date of Title VII.

In reviewing the history of collective bargaining at Pullman's Bessemer plant, an inquiry which has relevance to and could be treated under each of the four James factors, the plaintiffs note the role played by the IBEW. During its short-lived tenure, the IBEW was an all-white unit - a matter, however, for which neither the company nor the USW can be blamed. In any event, it was decertified in 1946, with its members being reabsorbed into the Maintenance department represented by the USW. The next USW contract, at the suggestion of a black member of the negotiating committee, provided such persons (no differently from other USW members) with occupational seniority. While the plaintiffs challenge the spin-off of one part of the former IBEW members into a separate department (Powerhouse) in 1954 when departmental seniority was reinstituted, it should be noted that this provided them with no greater seniority protec-

tion than they had enjoyed during the 1941-46 period when they were part of an all-white representational unit.

Even greater stress is placed by the plaintiffs on the role of the IAM. Plaintiffs view the evidence as showing that the IAM never wanted to represent any black employees and that, by a series of maneuvers including agreements with the NLRB and later a partial ceding of members, it was able to eliminate blacks from its membership, a matter which continued until passage of Title VII. While the objective facts are not greatly in dispute, the defendants here do challenge the characterization of the IAM motives, asserting that the changes took place because of initial confusion over which craft and craft-related positions should be properly represented by the IAM and because of subsequent loss of support of the IAM by many of its members.

Whatever the motives of the IAM in the 1941-42 period - the court finds it unnecessary to resolve this factual dispute - the USW cannot be charged with racial bias in its response to the IAM situation. The predecessor of the USW sought to represent all workers, black and white, in the plant. It accepted additional workers of both races into its local after the election, when that opportunity presented itself. Its concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because it viewed them as scabs who had not honored picket lines. Its representation of those who had been a part of the original USW group. The departments of the former IAM members were, with one exception (the Air Brake Pipe Shop), the same as had existed prior to any unionization or seniority rights. While the Air Brake Pipe Shop was treated after the 1954 contract as a separate department, this provided no greater seniority protection than such persons

had enjoyed during the 1941-44 period (when they were members of a predominately white representational unit) or during the 1944-54 period (when they were either a separate department under departmental seniority or were under an occupational seniority system).

The effort of the plaintiffs to fix responsibility on the company for whatever racial discrimination may have existed in the IAM is likewise without merit. The company properly took a "hands-off" approach towards the establishment of the election units and the subsequent modifications of the representational units. It bargained with those unions which were afforded representational status by the NLRB. and did so without any discriminatory animus.

The seniority system under challenge in the case *sub judice* - that between the company and the USW - had its genesis *at a time* when there was wide-spread racial segregation but *not as a result of, nor in furterance of,* such discrimination.

(4) Purposes of Seniority System.

The fourth factor is "whether the system was negotiated and has been maintained free from any illegal purpose." James, *supra,* 559 F.2d at 352. 15 FEP Cases at 861. On the basis of facts already discussed in this opinion, which need not be here repeated, the court finds that the seniority system between the company and the USW has been negotiated and maintained free from any discriminatory purpose. In reaching this conclusion, the court has carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years. This is not a situation, such as was described in James, *supra,* where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices. The major impediment to employment opportunities for blacks - the custom of treating certain jobs as reserved for members of a particular race - was removed prior to

the effective date of Title VII by the very instrument here under attack, i.e., the seniority system. That system did not then provide - nor has there been any subsequent effort to erect - barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. The provision for seniority by departmental age - which, depending upon viewpoint, may be viewed either as a restriction or as a protection - has been negotiated and maintained by blacks, no less than by whites.

(5) Totality.

The factors extracted by James from Teamsters are ultimately but aids, or focal points, for deciding "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system", which is in turn "integral to a determination that the system is or is not bona fide." James *supra,* 559 F.2d at 351. 15 FEP Cases at 861. Looking not only to the four factors at least three[22] of which are found here adverse to the plaintiffs, but also to totality of the system under attack, the court finds and concludes that the system is "bona fide" and that the differences in terms, conditions or privileges of employment resulting thereunder are "not the result of an intention to discriminate" because of race or color. The defendants have met the burden of proving the applicability of Section 703(h) of the Civil Rights Act of 1964. Judgment will be entered accordingly.

III. Attorneys Fees and Costs.

While the defendants have prevailed in this litigation, neither in its institution nor in continuation were the plaintiffs' claims frivolous, unreasonable or groundless. Award of attorney's fees is denied under the authority of Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 46 LW 4105, 16 FEP Cases 502(1978). Costs not previously taxed shall moreover be borne by the respective parties incurring the same.

Judgment

In accordance with the findings of fact and conclusions of law contained in the Memorandum of Opinion filed concurrently herewith, judgment is hereby entered in favor of the defendants. Each party shall bear its own costs.

SWINT V - Footnotes

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[1] In March 1978 the plaintiffs moved the court to take judicial notice under FRE 201 of parts of answers to interrogatories filed by the International Association of Machinists in a case in this court involving another company. While judicial notice can be taken under FRE 201(f) after the evidence has been closed, this request is due to be denied as involving matters not covered by FRE 201(b). In short, the matters sought to be noticed are neither "(1) generally known within the territorial jurisdiction of the trial court" nor (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Indeed, while IAM's answers to interrogatories in another case (or even in this case) could have been introduced in evidence *against* IAM as a party-opponent (albeit a party for the very limited purpose of possible relief) under FRE 801(d)(2), such hearsay would not have been admitted against other defendants under FRE 802. Unlike depositions — which have a special rule of admissibility provided in the Federal Rules of Civil Procedure — interrogatories must, when offered in evidence to prove the truth of the matters asserted therein, satisfy some exemption or exception to the hearsay rules of the FRE. See 4A Moore's Federal Practice ¶33.29 [1. — 2]. Even in circumstances where they would have been admissible if offered, the unoffered interrogatories are not treated as evidence or the subject of judicial notice. See Jones v. Diamond, 519 F.2d 1090, 1098 n.13 (CA5 1975); Bracey v. Grenoble, 494 F.2d 566, 570 n.7 (CA3 1974).

[2] The IAM and its Local Lodge 372 were not named in the EEOC charges from which this litigation arose or in the complaints initially filed in this court They were joined as defendants at the time of trial for the limited purpose that the relief to which the plaintiffs might be entitled against the company and the USW might involve possible modification of the IAM collective bargaining agreements. The limited role of the IAM defendants does not mean, however, as the company apparently contends, that evidence respecting the IAM and its agreements is irrelevant to the issues concerning the validity of the seniority system existing between the company and the USW — such matters being part of the "totality of the circumstances in the development and maintenance" of the system which is at issue. See James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352, 15 FEP Cases 827, 861 (CA5 1977).

[3] It is not without significance to the issue now before the court that it was the seniority system itself which in early 1965 provided the means for overturning the practice of job segregation.

[4] There is no claim that the effects of prior discrimination in segregation of jobs within a department are perpetuated by the USW seniority system, for the system allows use of departmental age for promotions without the interposition of lines of progression. The IAM agreement, measuring seniority by job classification within the department, makes no provision for use of seniority in promotions.

[5] One of the USW departments, the Boiler House, which at its peak had but, three employees, was vacated on June 22, 1964.

[6] See Pullman-Standard II, 539 F.2d at 82 n.3, 13 FEP Cases at 607.

[7] At one of Pullman's four plants (Worcester), a system of plant-wide seniority was adopted. According to the evidence, the problems created by the rule contributed substantially to the ultimate closing of the plant for economic reasons.

[8] Actually, at the time the Inspection department was created, seniority was measured by service in the occupation within the department, so that its creation as a separate department, so that its creation as a separate department deprived no one, white or black, of employment opportunities. With the return several years later to departmental seniority, it did, in retrospect, mean a loss of opportunities to both whites and blacks in the operating departments.

[9] Plaintiffs specifically disavow any intent to condemn all departmental seniority systems. The approach, however, of their attack on the system here in issue includes elements which would apply to all such systems.

[10] The Hammond plant does not build cars. It only provides repair services and produces certain parts and components.

[11] It would be equally appropriate to treat these matters under the factors involving the purposes of the seniority system, for the plaintiffs' attack partakes of both facets.

[12] There is a dispute between the parties as to whether the shops were treated as separate departments prior to unionization. The court finds that, although certain employees in the Wheel & Axle shop were joined with those in the Truck shop for cost accounting purposes, the two were in fact treated as separate departments.

[13] The original NLRB certification and election had included employees of both departments in the same representational unit. However, a clarification was issued the following month by the NLRB to the effect that most of the Wheel & Axle employees were in the IAM unit, with the Truck employees being in the USW unit.

[14] It is not without significance that blacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeemen, and negotiators. While not foreclosing the possibility of discriminatory conduct, see Rodriquez v. East Texas Motor Freight, 505 F.2d 40, 8 FEP Cases 1246 (CA5 1974), these facts are certainly relevant to the issues before the court.

[15] The Steelworkers Organizing Committee later became part of the USW. For simplicity SWOC is treated in this Memorandum as equivalent to the USW.

[16] In 1946 the IBEW was decertified and the employees in the two IBEW units became USW members. Thereafter they were included in USW contracts.

[17] As will be noted infra, a substantial portion of IAM workers were ceded in 1944 to the USW, leaving two IAM units which were, until much later, all-white.

[18] It may be noted that the possibility of merging the Janitors and Plant Protection employees was raised in 1962 by a white member of the union negotiating committee, but rejected by a black member of that negotiating committee who was a member of the Janitors department.

[19] Bessemer's Air Brake Pipe Shop is another which was created as a result of the tri-partite certification and election. It has retained separate existence as a department except during the period when the USW contract called for occupational seniority.

[20] The "genesis" factor, if dependent upon a finding of causation, might well be surplusage in view of the fourth factor ("whether the system was negotiated * * * free from any illegal purpose") unless, that is, the fourth factor were treated as involving only the later period of time when the challenged collective bargaining agreement was negotiated. While "causation" is here held not to be a condition precedent to relevancy under the third factor, it is nevertheless of great

significance in determining its weight. After all, it is the applicability of Section 703(h) that is ultimately before the court. See Southbridge Plastics v. Local 759. Rubber Workers, 565 F.2d 913, 16 FEP Cases 507 (CA5 1978).

[21] E.g., separate seating and separate social functions for whites and blacks.

[22] The "genesis" factor may be said to be favorable to the plaintiffs if causation be ignored and the existence of other discrimination be deemed sufficient.

SWINT VI

Louis SWINT and Willie James Johnson, on behalf of themselves and others similarly situated, Plaintiffs-Appellants,

v.

PULLMAN-STANDARD, Bessemer, Alabama, United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO and International Association of Machinists and Aerospace Workers, AFL-CIO, Defendants-Appellees.

No. 78-2449.

United States Court of Appeals,
Fifth Circuit.

Aug. 18, 1980.

Ocsar W. Adams, Jr., Birmingham, Ala., Elaine R. Jones, Washington, D. C., for plaintiffs-appellants.

Thomas, Taliaferro, Forman, Burr & Murray, Birmingham, Ala., Bernard Kleiman, Chicago, Ill., Carl B. Frankel, Pittsburgh, Pa., Franklin B. Snyder, Chicago, Ill., for Pullman-Standard.

Cooper, Mitch & Crawford, John C. Falkenberry, C. V. Stelzenmuller, D. Frank Davis, Birmingham, Ala., for United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO & Intern. Ass'n of Machinists & Aerospace Workers, AFL-CIO.

Appeal from the District Court for the Northern District of Alabama.

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

In this class action employment discrimination suit, before us for the second time, we review judgments of the district court rejecting claims of racial discrimination in employment. The claims are primarily aimed at the establishment and continuation of a departmental seniority system and the selection of supervisory personnel. Because we find certain conclusions of the district court to be inconsistent with the applicable case law and unsupported by the record, we reverse the judgments and remand for proceedings necessary to render appropriate relief.

The original complaint in this action was filed on October 19, 1971, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. The claims of racial discrimination were made against Pullman-Standard, a division of Pullman, Inc., a manufacturer of railway freight cars and parts, United Steelworkers of America (U.S.W.) and its Local 1466, the bargaining representative of most of the production and maintenance workers at Pullman-Standard. Leave of court was granted to amend the complaint to add as a defendant, for purposes of relief other than money damages, the International Association of Machinists (I.A.M.), the bargaining representative of other departmental units at Pullman-Standard. The class was certified pursuant to Fed.R.Civ.P. 23(b)(2) on behalf of all black persons who worked at any time "within one year prior to the filing of any charges under Title VII."

In July and August of 1974, a sixteen-day trial was held in the United States District Court for the Northern District of Alabama. Appellants challenged discrimination in the departmental seniority system negotiated by the appellees, its procedure for assignment of work within the same job classification, promotions to supervisory positions, lack of job posting, and the discharge of plaintiffs' and plaintiff-intervenor Clyde Humphrey. At the close of appellants case, the U.S.W. and Local 1466 filed motions for involuntary dismissal of the claims

asserted by plaintiff-intervenor Clyde Humphrey that the union failed to represent them because of their race. The motion was granted and those claims were dismissed. On September 13, 1974, the district court denied the appellants' several claims of racial discrimination. On appeal to this court, we affirmed the judgment in part and remanded in part for further proceedings with respect to the issues of the seniority system and the selection of supervisors. *Swint* v. *Pullman-Standard,* 539 F.2d 77 (5th Cir. 1976).

FACTS

We need not restate the extensive factual background contained in our decision on the first appeal, *Swint* v. *Pullman-Standard.* The following facts are helpful, however, in discussing the issues relevant to this second appeal.

Since the first collective bargaining agreements were negotiated between Pullman-Standard and the U.S.W. and I.A.M. in 1941, seniority was measured by length of continuous service in a particular department. Seniority has been exercised in the event of increases and decreases of forces, in competition with all other employees in that department. Under the company-wide collective bargaining agreement negotiated in 1954, there were no lines of promotion or progession in any department. Seniority was not formally recognized for promotional purposes until 1956. There was no carryover of seniority. Employees transferring from one department to another were treated as "new" employees in the department to which transferred, and, with limited exception for those transferring at the request of the company or electing transfer in lieu of lay-off, also lost their seniority in the "old" department. Seniority rosters at the company were maintained by department. Departmental age was basically the sole criterion used to determine who was rolled-back or laid-off in the event of reductions, and who was recalled or promoted in the event of force increases or other vacancies in the department. The seniority system in effect

in 1954 remained virtually unchanged through the next eighteen years of collective bargaining between Pullman-Standard, and the U.S.W. and I.A.M.

In 1972, provisions were made in an agreement with the Office of Federal Contract Compliance (O.F.C.C.), to permit black employees hired before April 30, 1965, to transfer from predominately black departments or to predominately white departments, in either case, with carryover of seniority. The restriction against carryover of seniority on departmental transfers continued in effect as to black employees when transferring from a "mixed" department to another "mixed" department, as well as to black employees hired after April 30, 1965, and to white employees.

Until the arbitration decision in March of 1965, there was an informal custom at the plant of treating certain jobs as "white only" and others as "black only." This practice caused decisions respecting assignments to departments throughout the plant to be infected during that period with racial considerations. According to the plaintiffs, the effects of this discrimination in the departmental assignments have been perpetuated by the seniority system—a system which determines employment rights on the basis of departmental age, and which, even with the 1972 changes, provides barriers to departmental transfers.

Prior to June 1965 there were no black foremen at Pullman-Standard. At the time of the first trial, approximately ten percent of the salaried foremen were black. The labor market, at the time of this trial, ranged from twenty-five to thirty-five percent black, depending on the age group and area selected. Pullman's work force, depending upon the time selected, ranges from approximately forty-five to almost fifty percent black. Selection of foremen is made by groups of supervisors, without any objective standards or tests. The plant manager and superintendent choose department heads (C foremen) who in turn select tract supervisors (B foremen), production foremen

(A or salaried foremen), and hourly (temporary) foremen. The first black salaried foreman was not promoted to the then 143 existing salaried foreman positions until 1966. Four years later, there were nine black salaried foremen and 151 white foremen. Up until the time of trial, blacks had never been offered either salaried or temporary foreman positions in thirteen of the twenty-eight departments at Pullman-Standard. From 1966 until the time of trial, only twelve blacks were selected to fill fifty-nine salaried foreman vacancies.

THE DISTRICT COURT'S ORDER

On July 5, 1977, the district court, pursuant to our remand for further proceedings with respect to issues regarding the validity of the seniority system and the selection of supervisors, concluded that the seniority system at Pullman-Standard does not discriminate against blacks, is "valid" under 42 U.S.C. § 2000e-2(h), and the appellees did not follow any practice or policy after the effective date of the Act which discriminated against blacks in the assignmet of employees to departments; further, the appellants' prima facie showing of discrimination in the selection of supervisory personnel has been rebutted by the appellees, and no such discriminatory practice existed subsequent to 1966. At the request of appellants, the district court granted a new trial for the limited purpose of receiving new evidence which would have been relevant under the Supreme Court's decision in *Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The present case was under submission when *Teamsters* was decided and had been tried at a time when all concerned acted under what turned out to be an erroneous view of the law. On May 8, 1978, after hearing further evidence, the district court entered an order finding the seniority system in question to be "bona fide" within the meaning of section 703(h) of Title VII.

ISSUES

The critical issues before us are: (1) whether Pullman-Standard made racially discriminatory assignments to departments after the effective date of Title VII of the Civil Rights Act of 1964, (2) whether the seniority system at Pullman-Standard is "bona fide" within the meaning of § 703(h) of Title VII, and (3) whether Pullman-Standard successfully rebutted appellants' prima facie case of racial discrimination in the selection of foremen.

I

The appellants argue that the district court erred in its finding that Pullman-Standard's post-Act assignments to departments were not racially motivated. In *Teamsters* v. *United States*, the Supreme Court held that a finding of validity respecting a seniority system does not thereby preclude the implementation of remedial measures for persons who seek relief from an employer's *post-Act* hiring discrimination. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). Based upon *Teamsters*, and *Franks*, the district court proceeded to make an initial determination whether the seniority system was "valid" under 42 U.S.C. § 2000e-2(h). After finding that the seniority system does not discriminate against blacks and is therefore "valid," the court considered whether there were discriminatory assignments to departments on and after December 27, 1966,[1] and found that there were not.

To facilitate its evaluation of the issue of post-Act departmental assignments, the district court utilized statistics obtained from the compnay's records, which consisted of seniority lists for the years 1965 to 1973.

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1 All footnotes for this section appear at the end of this opinion, pp. 229a to 230a.

The district court made a chart showing, for back years starting June 1966, the number of individuals by race, assigned to each of the twenty-eight departments at Pullman-Standard. The court found it useful to look particularly at assignments after December 1966, in the six formerly one-race departments. Although the district court did not reproduce the chart in its Memorandum Opinion, the court interpreted from the chart that Pullman-Standard, after December 1966, was no longer making assignments to departments based on race, except to the extent of attempting to rectify imbalances caused by its earlier discriminatory practices.

"In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts. *Jones* v. *Lee Way Motor Freight, Inc.*, [431 F.2d 245 (10th Cir. 1970)];" *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

Our review of the exhibits upon which the district court based its conclusion reveals erroneous interpretations of the statistics contained therein. In 1966, the Die & Tool Department (I.A.M.) included seventy-seven whites and no blacks. The district court found that six blacks and one white were assigned to the Die & Tool Department (I.A.M.), in 1966, and over the next four years, seven other blacks and eight whites were assigned to it. Our review of the evidence indicates that between 1965 and 1970, the company made approximately thirty-six new assignments to this department, all white persons. The first black was assigned to the department in 1970. In 1971, seven whites were assigned to the department along with two more blacks.

In 1966, there were seventy whites in the Maintenance Department (I.A.M.), and no blacks. The district court found that the first post-1966 assignments to the Maintenance Department (I.A.M.), were three blacks and four whites. The record evidence establishes that the company assigned seven new employees to this department between 1967 and 1970, all of whom were white. The first blacks were assigned to the department in 1970 when six blacks were assigned to the department along with four whites.

The district court found that, subsequent to 1966, the first vacancies in the other previous all-white departments are filled by blacks and the first vacancies in the previous all-black departments are filled by whites. At this point, the court essentially ended its analysis and concluded that there was no policy or practice of discriminatory departmental assignments after December 1966. Our examination of the statistics is in the context of the plant as a whole. Although the statistics disclose that the company made significant advancements in the elimination of previous all-black and all-white departments subsequent to 1966,[2] the total employment picture indicates that departmental assignments continued to be infected with racial considerations, albeit to a lesser degree than during the pre-Act period.

We find the district court's conclusion that no discrimination existed in post-Act assignments to be factually unsubstantiated. We have carefully reviewed the post-Act assignment statistics and, taken as a whole, they clearly support the appellants' contention that Pullman-Standard discriminated against blacks in the assignment of employees to departments after the applicable period.

II

The appellants argue that the district court erred in concluding that the departmental seniority system is "bona fide" within the purview of Section 703(h) of the Civil Rights Act of 1964.

In *Teamsters* v. *United States,* the Supreme Court held that, absent a showing of discriminatory purpose in a seniority system, that system is protected by § 703(h), 42 U.S.C. § 2000e-2(h) from attack on Title VII on grounds. *Harris* v. *Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980). *Fisher* v. *Proctor & Gamble Manufacturing Co.*, 613 F.2d 527 (5th Cir. 1980). *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978). *Southbridge Plastics Division, etc.* v. *Local Valves & Fittings Co.*, 565 F.2d 913 (5th Cir. 1978). *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (1977), *cert. denied,* 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). Section 703(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

In *James* v. *Stockham Valves & Fittings Co.*, we noted that the analysis in *Teamsters* suggests that the totality of the circumstances in the development and maintenance of a seniority system is relevant to examining "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system [which is] integral to a determination that the system is or is not bona fide." *James,* at 351. *James* extracts four factors from *Teamsters* which are helpful in deciding this issue:

1. Whether the seniority system operates to discourage all employees equally from transferring between seniority units;

2. Whether the seniority units are in the same or separate bargaining units (if the latter, whether that

structure is rational and in conformance with industry practice);

3. Whether the seniority system has its genesis in racial discrimination; and

4. Whether the system was negotiated and has been maintained free from any illegal purpose.

James, at 352.

Although the district court appropriately utilized the analysis provided in *James*, we are not satisfied that the court's ultimate conclusion is amply supported by the record evidence.

In consideration of "[w]hether the seniority system operates to discourage all employees equally from transferring between seniority units," *James*, at 352, the district court made several findings. It found that the departmental seniority system was applied in a uniform manner, regardless of race or color, and that the limited number of interdepartmental transfers granted were handled in a fair and nondiscriminatory manner. The district court found that, to the extent the seniority system "locks" employees into a department and discourages transfers, it does so equally for both whites and blacks—that is, it did so until 1972. The district court acknowledged that a somewhat greater impact might be felt by blacks than by whites if one were to rank the 28 U.S.W. and I.A.M. departments according to some perceived order of desirability to determine which group was the more discouraged from transferring. According to the district court, such a study of relative economic desirability would be inappropriate in light of the rationale in our decision on the previous appeal, 539 F.2d 77 (1976). As the district court stated in its order, "if one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite—equality or neutrality without reference of such desirability." Our holding that appellants need not show that they were assigned discriminatorily to less

desirable departments in order to prove a prima facie case of racial discrimination cannot reasonably be construed to preclude consideration of the fact that by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites.

While acknowledging differences in the departmental structure at Pullman-Standard from those at other Pullman plants, the district court did not find such differences sufficient to establish the departmental structure to be irrational or inconsistent with industry practices. The court concluded that the seniority units at Pullman-Standard constitute a rational structure, "in context, and taken as a whole." They are, according to the district court, consistent with practices which were, at the time, generally followed at other unionized plants throughout the country, at other companies in the same industry, and at Pullman plants located outside of the south where race was presumably not a potential consideration. In attacking the rationality of the seniority units, appellants primarily attacked the two separate Die & Tool Departments and the two separate Maintenance Departments at Pullman-Standard. No similar situations existed at Pullman's other plants.[3] No such division existed at Pullman-Standard prior to unionization and seniority. The district court placed primary responsibility for this situation on the N.L.R.B. In 1941, at the request of the petitioning unions, the N.L.R.B. divided the plant into three representational units for election purposes. This was allegedly done over the opposition of the predecessors of the U.S.W.,[4] which sought to represent all production and maintenance employees. The district court did not find this circumstance to diminish the bona fides of the seniority system between the company and the U.S.W. The court asserted that the separation within the various units was not, as in *Teamsters*, "consistent with National Relations Board precedent," *Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1865; but was required by a specific decision of the N.L.R.B. and the outcome of the elections. Accordingly, the court found the departmentalization at Pullman-Standard to be

rational, in accord with industry practice, and consistent with N.L.R.B. policies.

The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races.

As of the date of its certification to represent employees of Pullman-Standard, November 19, 1941, the I.A.M. unit included twenty-four black workers. Shortly thereafter, agreements between the I.A.M. and Steel Workers Organizing Committee (S.W.O.C.)[5] resulted in the I.A.M. giving its black members to the S.W.O.C. in return for two of the S.W.O.C.'s white members, which resulted in the I.A.M. being an all-white bargaining unit. The first U.S.W. contract with Pullman-Standard, providing for departmental seniority, excluded blacks from the better jobs. Blacks were relegated to the least remunerative departments. The creation of the new departments in the years subsequent to unionization involved continued separation of the races. The general effect of the new department was to restrict black workers to lower paying jobs. For example, the seniority rosters indicate that between 1947 and 1952, the all-white watchmen and all-black janitors were both in the Safety Department. The 1953 seniority list carries both jobs under a Plant Protection Department. The 1954 seniority list shows the janitors in an all-black Janitors Department and the watchmen in an all-white Plant Protection Department. They remained separate departments until the time of trial.

The evidence further indicates that the Pullman-Standard plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers.

The record evidence, generally, indicates arbitrary creation of the departments by the company since unionization and an attendant adverse affect on black workers. The individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice, are indicative of attempts to maintain one-race departments.

The district court determined that the seniority system in the present case has its genesis at a time when there was widespread racial segregation, but the system was not itself the product of this bias. The court took judicial notice of the widespread extent of segregation in the community in 1941-42, when organizational efforts were successful and the first collective bargaining agreements were signed, and also in 1954, when the seniority system in this litigation became essentailly fixed. At both times, racial segregation was extensively practiced at Pullman-Standard, in the union hall, and in the community as a whole. Most of the jobs at the plant were, by custom, treated as "white only" or "black only." Bath houses, locker rooms, and toilet facilities were racially segregated. So were company records, including employee rosters, internal correspondence, records of negotiation sessions, and lists of persons picketing. The court acknowledged that in 1941, some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions at the unions were also segregated.

The court found that, although the U.S.W. Local possessed some of the local trappings taken from an otherwise segregated society, it did not function in fact to foster and maintain segregation. Rather, it served a joint interest of white and black workers for a higher priority than racial considerations. Further, in 1954, as well as 1941 and the intervening years, blacks

were involved actively in the leadership of the local union and had an equal vote in the formulation of the policies and positions of the union, the local not being dominated by whites.

The court took into consideration the plaintiffs' contention that the I.A.M. effectively eliminated blacks from its membership. The court dismissed the relevancy of this point by concluding that the U.S.W. cannot be charged with racial bias in response to the I.A.M. situation and that the U.S.W. sought to represent all workers, black and white, in the plant.

The district court's failure to recognize the I.A.M. as a party to the present case blemishes its consideration of the genesis of the seniority system. Although the I.A.M. is a party to the present case for purposes of relief other than money damages, it is indeed a party. The motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination. The I.A.M. was one of the unions which unionized the company in 1941 and the evidence reflects that the I.A.M. manifested an intent to selectively exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding. The record makes clear that blacks were restricted from the better jobs under the first U.S.W. contract. The district court itself indicated that the first instance disclosed by the record in which the U.S.W. sought to remove the restriction of "black only" jobs was in 1965. It is crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter.

The district court found that the seniority system had been negotiated and maintained free from any discriminatory purpose. According to the court, this is not a situation, as was described in *James* v. *Stockham Valves & Fittings Co.*, where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices. The court asserted that the major impediment to employment op-

portunities for blacks—the custom of treating certain jobs as reserved for members of a particular race—was removed prior to the effective date of Title VII by the very instrument under attack, i.e., the seniority system. Finally, the court found that the provision for seniority by departmental age has been negotiated and maintained by blacks as well as whites.

The court concluded that it found at least three of the four factors provided for analysis in *James*, in addition to general considerations of the totality of the system under attack, to be adverse to the plaintiffs. Therefore, the system was determined to be "bona fide."

Having carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is "bona fide" within the meaning of section 703(h) of Title VII, we reject the district court's finding.

An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made.[6] There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.

The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U.S.W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U.S.C. §2000e-2(h).

III

The district court concluded that plaintiffs had made a prima facie case of racial discrimination in the selection of supervisory personnel but that the defendants rebutted it.

The district court accepted Pullman-Standard's insistence that "special skills" are needed to be supervisors. The court acknowledged the practice at Pullman of selecting salaried supervisors from the ranks of those who have purportedly demonstrated their capabilities as temporary foremen. This limitation was found by the court to be a bona fide occupational qualification, sufficient to rebut plaintiffs' prima facie showing with respect to salaried supervisors.

The court considered it appropriate in this case to analyze promotions to temporary foreman on a departmental basis. Promotions to temporary foreman are made according to the needs of the individual departments, they are made by the supervisory personnel in that department, and are made from the employees working in that department. The district court found this restriction of such temporary promotions to persons

working in the particular department to be a "bona fide occupational qualification, justified by business necessity, under the evidence in this case."

The fact that blacks were concentrated in certain departments, and were not significantly represented in departments from which supervisors were selected as needed, was taken into consideration by the district court. The court focused on the large disparity in promotions in the Welding Department. During 1967 and 1968, there were twenty promotions in that department and not a single black was selected. The problem, according to the district court, was that black welders had only a few months of experience as welders at that time, and did not possess the skills needed to act as formen in that department. This was considered not to be the result of any post-Act discrimination—the company had actively sought and trained blacks to be welders. But, to prevent employment of unqualified welders, the company adopted procedures to verify qualifications.

First, the district court's finding that "the restriction of . . . temporary promotions to persons working in the department is a bona fide occupation qualification, justified by business necessity . ." confuses the definite distinction between a bona fide occupational qualification defense and a business necessity defense. Although the two concepts are similar and distinct, and apply to different factual situations.

The doctrine of business necessity is operative when an employment criteria which is "fair in form, but discriminatory in operation" is otherwise shown by the defendant to be related to job performance. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 431, 91 S.Ct. 849 at 853, 28 L.Ed.2d 158. A bona fide occupational qualification, on the other hand, is deliberately calculated by the employer to discriminate. An employment criteria is justified under the bona fide occupational qualification defense when a certain sex, national origin, or religion is reasonably

necessary to satisfy a particular business need. *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1970). *See also, Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971).

We proceed, therefore, to consider whether the defense set forth by Pullman-Standard qualifies as either a bona fide occupational qualification or a business necessity defense.

Title VII, 42 U.S.C. § 2000e-2(e)(1) permits discrimination in hiring and employment "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Neither race nor color is included in this section. We believe that the omission of race and color as bona fide occupational qualifications was deliberate and intentional on the part of Congress. Our interpretation of the legislative history of this section is that Congress did not view race as a qualification which could, conceptually, be reasonably necessary to the efficient operation of any business. Senators Clark and Case, the floor managers for the Civil Rights Bill in the Senate, submitted to the Senate and "Interpretative Memorandum" to explain the exception:

> * * * [The Section] creates certain limited exceptions from these prohibitions [of section 703]. First, it would not be an unlawful employment practice to hire or employ employees of a particular religion, sex, or national origin in those situations were religion, sex, or national origin is a bona fide occupational qualification for the job. *This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence.* This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational

> qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion * * * (110 Cong.Rec. 7213; emphasis supplied).

Diaz v. *Pan Am World Airways, Inc.*, 311 F.Supp. 559 at 569 (S.D.La.), rev'd. on other grounds, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971). The legislature, therefore, has indicated that customer preference may be considered under the limited "bona fide occupational qualification" exception in the areas of religion, sex, and national origin, but not on grounds of race or color. *See also, Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Since the alleged discrimination in this case is based on race, the bona fide occupational qualification exception cannot be applicable.

It is settled in this circuit that "the one and only justification for standards or procedures which operate to deny Blacks promotional opportunities" is the business necessity defense. *Rowe* v. *General Motors Corp.*, 457 F.2d 348 at 354 (5th Cir. 1972). We provided in *Rowe:* "The only justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that the standards or procedures arise from a nondiscriminatory legitimate business defense. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Local 189, United Paper Makers and Paper Workers, AFL-CIO, SLC* v. *United States*, [416 F.2d 980 (5th Cir. 1969)]." *Id.* at 354. Further, we derived from *Griggs* v. *Duke Power Co.* three factors for determining whether promotional standards and procedures arise from a legitimate business necessity so as not to constitute a Title VII violation: "(1) The standards and procedures were not shown to

be significantly related to successful job performance. (2) The procedures operated to disqualify a substantially higher rate of Blacks than Whites. (3) The jobs in question had formally been filled by whites as part of a longstanding practice of discrimination. . . ." *Rowe* at 355.

That factors two and three of the standard quoted above apply in favor of the appellants in this case is a foregone conclusion. In evaluation of the first factor, we are influenced by the lack of any articulated or defined skills which are necessary to perform capably as a temporary or salaried foreman at Pullman-Standard. Further, with regard to the promotion to temporary foremen of those within the particular department to which promoted, the evidence indicates that a substantial number of salaried and temporary foremen supervise departments in which they have never worked. We are additionally concerned about the low percentage of black supervisors in predominately black departments. We cannot agree that the business need advanced by the defendants for the limitation which restricts the promotion of blacks to supervisory positions is sufficiently compelling to override the significant racial impact of the limitation.

We have further held that for a practice, which is not intentionally discriminatory or neutral but perpetuates consequences of past discrimination, to be justified by business necessity, the practice must "not only foster safety and efficiency, but must be essential to that goal . . . and there must not be an acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' " *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir.), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). The district court did not expose any evidence sufficient to show that the limitation upon which the defendants' business necessity defense rests is essential to the safety and efficiency of the operations at Pullman-Standard, nor do we find evidence in the record to that end.

The district court further considered probative in its analysis of the defendants' rebuttal arguments the fact that blacks refused supervisory promotions to a greater degree than whites; and peer pressure directed by black employees against black foremen discouraged many blacks from displaying good supervisory qualities, from accepting promotions, and from remaining in supervisory postions.

These circumstances undeniably emanate from the very discrimination which the class members seek to eliminate. When insufficient initiatives which purport to rectify a personnel imbalance follow a history of preserving certain personnel positions for a select group based upon race, such peer pressure naturally and conveniently results therefrom. Furthermore, these variables relied upon by the district court do not weigh heavily enough to lessen the appellants' empirical conclusions that black employees were locked in the lower paying jobs and departments. *See Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). We hold, therefore, that the defendants failed to rebut the plaintiffs' prima facie case of racial discrimination in the selection of supervisory personnel.

IV

Pullman-Standard's claim, on appeal, that the class representatives in the present case have no standing to maintain this appeal because their individual claims have been mooted or destroyed is without merit. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). *See also, East Texas Motor Freight* v. *Rodriquez*, 431 U.S. 395, 406 n. 12, 97 S.Ct. 1891, 1898 n. 12, 52 L.Ed.2d 453 (1977); *Franks* v. *Bowman Transportation Co.*

APPROPRIATE RELIEF

Having rejected the district court's finding that Pullman-Standard did not make racially discriminatory assignments to departments after the effective date of Title VII, that the seniority system at Pullman-Standard is "bona fide" within the meaning of § 703(h) of Title VII, and that Pullman-Standard has successfully rebutted appellants' prima facie case of racial discrimination in the selection of foremen, we reverse the judgments appealed from and remand to the district court for proceedings necessary to provide appropriate relief.

REVERSED AND REMANDED.

SWINT VI - Footnotes

[1] Although the first primary charge directly bringing into question the company's assignment policies was filed on May 11, 1970, a charge had been previously filed by an EEOC Commissioner on March 27, 1967 questioning the hiring and promotion practices of Pullman. Because the district court found this earlier charge to be susceptible to the interpretation that it related also to assignment and transfer matters, the court used the date 90 days before the March 27, 1967 Commission charge for its analysis.

The 1972 amendment to Title VII extended the time for filing charges to 180 days, and this extension has been considered to be effective retroactively. See, e.g., *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975). But, the district court asserts that it finds there was no practice of discriminatory assignments to departments after September 28, 1966 anymore than there was after December 27, 1966. The 180 day statutory period is inconsequential to this analysis. See generally, *Fisher* v. *Proctor & Gamble Mfg. Co.*, 613 F.2d 527 (5th Cir. 1980); *Clark* v. *Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

[2] As of the 1973 seniority list, the Boiler House Department remained the sole one-race (white) department. No assignments had been made, as of the time of trial, to that department since the effective date of Title VII.

[3] At Pullman-Standard, there are two Die and Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union.

[4] The United Steelworkers (USW) evolved from the Steelworker's Organizing Committee (SWOC).

[5] See footnote 4.

[6] Findings of fact by the district court in Title VII cases are not to be set aside unless they are clearly erroneous, *Harrison* v. *Goodyear Tire & Rubber Co.*, 508 F.2d 678 (5th Cir. 1975), Fed.R.Civ.P. 52(a), that is, unless the appellate court is "left with the definite and firm conviction that a mistake has been committed." *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980), quoting *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). Where findings, however, are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand. *See, Rowe* v. *General Motors Corp.*, 457 F.2d 348, 356 n. 15 (5th Cir. 1972); *United States* v. *Pickett's Food Service*, 360 F.2d 338, 341 (5th Cir. 1966).

In *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), we stated:

> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or non-discrimination is a finding of ultimate fact. [Cites omitted.] In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.

518 F.2d at 339.

SWINT VII

U.S. Supreme Court

PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1190.

Argued January 19, 1982—Decided April 27, 1982*

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a statement concurring in part, *post*, p. 293. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined except as to Part I, *post*, p. 293.

Michael H. Gottesman argued the cause for petitioners. With him on the briefs for petitioners in No. 80-1193 were *Robert M. Weinberg, Laurence Gold, Jerome A. Cooper, Bernard Kleiman*, and *Carl B. Frankel. Samuel H. Burr* and *C.V. Stelzenmuller* filed briefs for petitioner in No. 80-1190.

Elaine Jones argued the cause for respondents. With her on the brief were *Jack Greenberg, James M. Nabrit III, Patrick O. Patterson, Judith Reed, Barry L. Goldstein*, and *C. Lani Gunier.***

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* Together with No. 80-1193, *United Steelworkers of America, AFL-CIO, et al.* v. *Swint et al.*, also on certiorari to the same court.

** *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Jessica Dunsay Silver, Marie E. Klimesz, Constance L. Dupre, Philip B. Sklover*, and *Vella M. Fink* filed a brief for the United States et al. as *amici curiae* urging affirmance.

Robert E. Williams and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae*.

JUSTICE WHITE delivered the opinion of the Court.

Respondents were black employees at the Bessemer, Ala., plant of petitioner Pullman-Standard (the Company), a manufacturer of railway freight cars and parts. They brought suit against the Company and the union petitioners—the United Steelworkers of America, AFL-CIO-CLC, and its Local 1466 (collectively USW)—alleging violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1976 ed. and Supp. IV), and 42 U.S.C. § 1981.[1] As they come here, these cases involve only the validity, under Title VII, of a seniority system maintained by the Company and USW. The District Court found "that differences in terms, conditions or privileges of employment resulting [from the seniority system] are 'not the result of an intention to discriminate' because of race or color," App. to Pet. for Cert. in No. 80-1190, p. A-147 (hereinafter App.), and held, therefore, that the system satisfied the requirements of § 703(h) of the Act. The Court of Appeals for the Fifth Circuit reversed:

> "Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U.S.C. 2000e-2(h)." 624 F.2d 525, 533-534 (1980).

We granted the petitions for certiorari filed by USW and by the Company, 451 U.S. 906 (1981), limited to the first question presented in each petition: whether a court of appeals is bound by the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the par-

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1 In their original complaint, besides challenging the seniority system discussed in this opinion, plaintiffs also alleged discrimination in job assignments and promotions and the failure to post publicly a list of changes in assignments. These were all brought as "class" issues. Two charges of individual discrimination were also brought. The Court of Appeals held that the Company had violated Title VII in making job assignments and in selecting foremen. In granting certiorari, we declined to review those aspects of the decision.

ties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the bona fides of the seniority system. We conclude that the Court of Appeals erred in the course of its review and accordingly reverse its judgment and remand for further proceedings.

I

Title VII is a broad remedial measure, designed "to assure equality of employment opportunities." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). The Act was designed to bar not only overt employment discrimination, "but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). "Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters* v. *United States*, 431 U.S. 324, 349 (1977) (hereinafter *Teamsters*). The Act's treatment of seniority systems, however, establishes an exception to these general principles. Section 703(h), 78 Stat. 257, as set forth in 42 U.S.C. § 2000e-2(h), provided in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race."

Under this section, a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977), we summarized the effect of § 703(h) as follows: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discrimina-

tory consequences." Thus, any challenge to a seniority system under Title VII will require a trial on the issue of discriminatory intent: Was the system adopted because of its racially discriminatory impact?

This is precisely what happened in these cases. Following our decision in *Teamsters*, the District Court held a new trial on the limited question of whether the seniority system was "instituted or maintained contrary to Section 703(h) of the new Civil Rights Act of 1964." App. A-125.[2] That court concluded, as we noted above and will discuss below, that the system was adopted and maintained for purposes wholly independent of any discriminatory intent. The Court of Appeals for the Fifth Circuit reversed.

II

Petitioners submit that the Court of Appeals failed to comply with the command of Rule 52(a) that the findings of fact of a district court may not be set aside unless clearly erroneous. We first describe the findings of the District Court and the Court of Appeals.

Certain facts are common ground for both the District Court and the Court of Appeals. The Company's Bessemer plant was unionized in the early 1940's. Both before and after unionization, the plant was divided into a number of different operational departments.[3] USW sought to represent all production and maintenance employees at the plant and was elected in 1941 as the bargaining representative of a bargaining unit consisting of most of these employees. At that same time, IAM became the bargaining representative of a unit consisting of five depart-

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2 The procedural history of these cases is rather complex. The original complaint was filed in 1971. Since that time the case has been tried three times and has twice been reviewed by the Court of Appeals.

3 In 1941, prior to unionization, the Bessemer plant was divided into 20 departments. By 1954, there were 28 departments—26 USW units and 2 International Association of Machinists and Aerospace Workers (IAM) units. The departments remained essentially unchanged after 1954.

ments.[4] Between 1941 and 1944, IAM ceded certain workers in its bargaining unit to USW. As a result of this transfer, the IAM bargaining unit became all white.

Throughout the period of representation by USW, the plant was approximately half black. Prior to 1965, the Company openly pursued a racially discriminatory policy of job assignments. Most departments contained more than one job category and as a result most departments were racially mixed. There are no lines of progression or promotion within departments.

The seniority system at issue here was adopted in 1954.[5] Under that agreement, seniority was measured by length of continuous service in a particular department.[6] Seniority was originally exercised only for purposes of layoffs and hirings within particular departments. In 1956, seniority was formally recognized for promotional purposes as well. Again, however, seniority, with limited exceptions, was only exercised within departments; employees transferring to new departments forfeited their seniority. This seniority system remained virtually unchanged until after this suit was brought in 1971.[7]

The District Court approached the question of discriminatory intent in the manner suggested by the Fifth Circuit in

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4 The International Brotherhood of Electrical Workers (IBEW) gained representation status for two small departments. The IBEW unit was all white. IBEW, however, was decertified in 1946 and its members were reabsorbed into a department represented by USW.

5 A departmental seniority system was part of the initial collective-bargaining agreement between the Company and USW in 1942. Between 1947 and 1954, however, the seniority system changed from one based on departments to one based upon particular occupations within departments. In 1954, the system went back to a departmental base.

6 The only exceptions, until 1972 (see n. 7, *infra*), were for employees transferring at the request of the Company or for those electing transfer in lieu of layoff.

7 In 1972, the Company entered into an agreement with the Department of Labor to bring its employment practices into compliance with Executive Order No. 11246, 3 CFR 339 (1964-1965 Comp.). This provided an exception to the departmental limit on seniority, allowing certain black employees to make interdepartmental transfers without any loss of seniority.

James v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (1977). There, the Court of Appeals stated that under *Teamsters* "the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue." 559 F.2d, at 352. There were, in its view, however, four particular factors that a court should focus on.[8]

First, a court must determine whether the system "operates to discourage all employees equally from transferring between seniority units." *Ibid.* The District Court held that the system here "was facially neutral and . . . was applied equally to all races and ethnic groups." App. A-132. Although there were charges of racial discrimination in its application, the court held that these were "not substantiated by the evidence." *Id.*, at A-133. It concluded that the system "applied equally and uniformly to all employees, black and white, and that, given the approximately equal number of employees of the two groups, it was quantitatively neutral as well." *Id.*, at A-134.[9]

Second, a court must examine the rationality of the departmental structure, upon which the seniority system relies, in light of the general industry practice. *James, supra*, at 352. The District Court found that linking seniority to "departmental age" was "the modal form of agreements generally, as well as with

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8 The Fifth Circuit relied upon the following passages in *Teamsters*, 431 U.S., at 355-356:

"The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into non-line-driver jobs, it does so for all. . . . The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that that seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose."

This passage was of course not meant to be an exhaustive list of all the factors that a district court might or should consider in making a finding of discriminatory intent.

9 The court specifically declined to make any finding on whether the no-transfer provision of the seniority system had a greater relative effect on blacks than on whites, because of qualitative differences in the departments in which they were concentrated. It believed that such an inquiry would have been inconsistent with the earlier Fifth Circuit opinion in this case.

manufacturers of railroad equipment in particular." App. A-137. Furthermore, it found the basic arrangement of departments at the plant to be rationally related to the nature of the work and to be "consistent with practices which were . . . generally followed at other unionized plants throughout the country." *Id.*, at A-136–A-137. While questions could be raised about the necessity of certain departmental divisions, it found that all of the challenged lines of division grew out of historical circumstances at the plant that were unrelated to racial discrimination.[10] Although unionization did produce an all-white IAM bargaining unit, it found that USW "cannot be charged with racial bias in its response to the IAM situation. [USW] sought to represent all workers, black and white, in the plant." *Id.*, at A-145. Nor could the Company be charged with any racial discrimination that may have existed in IAM:

> "The company properly took a 'hands-off' approach towards the establishment of the election units . . . . It bargained with those unions which were afforded representational status by the NLRB and did so without any discriminatory animus." *Id.*, at A-146.

Third, a court had to consider "whether the seniority system had its genesis in racial discrimination," *James, supra*, at 352, by which it meant the relationship between the system and other racially discriminatory practices. Although finding ample discrimination by the Company in its employment practices and some discriminatory practices by the union,[11] the District Court concluded that the seniority system was in no way related to the discriminatory practices:

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10 In particular, the court focused on the history of the unionization process at the plant and found certain of the departmental divisions to be based on the evolving relationship between USW and IAM.

11 With respect to USW, the District Court found that "[u]nion meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated." App. A-142. It also found, however, that "[w]hile possessing some of the trappings taken from an otherwise segregated society, the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations." *Id.*, at A-143.

> "The seniority system . . . had its genesis . . . at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of color-blind objectives of a union which—unlike most structures and institutions of the era—was not an arm of a segregated society. Nor did it foster the discrimination . . . which was being practiced by custom in the plant." Ap. A-144.

Finally, a court must consider "whether the system was negotiated and has been maintained free from any illegal purpose." *James, supra*, at 352. Stating that it had "carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years," App. A-146, the court found that the system was untainted by any discriminatory purpose. Thus, although the District Court focused on particular factors in carrying out the analysis required by § 703(h), it also looked to the entire record and to the "totality of the system under attack." *Id.* at A-147.

The Court of Appeals addressed each of the four factors of the *James* test and reached the opposite conclusion. First, it held that the District Court erred in putting aside qualitative differences between the departments in which blacks were concentrated and those dominated by whites, in considering whether the system applied "equally" to whites and blacks.[12] This is a purported correction of a legal standard under which the evidence is to be evaluated.

Second, it rejected the District Court's conclusion that the structure of departments was rational, in line with industry practice, and did not reflect any discriminatory intent. Its discussion is brief but focuses on the role of IAM and certain characteristics unique to the Bessemer plant. The court concluded:

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12 It does not appear to us that the District Court actually found a qualitative difference but held it to be irrelevant. The relevant passage of the District Court opinion read as follows: "By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could . . . attempt to measure the relative effect of the no-transfer rule on white and black employees . . . . It may well be that a somewhat greater impact was felt by blacks than whites although . . . this conclusion is by no means certain." *Id.*, at A-134.

> "The record evidence, generally, indicates arbitrary creation of the departments by the company since unionization and an attendant adverse affect *[sic]* on black workers. The individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice, are indicative of attempts to maintain one-race departments." 624 F.2d, at 532.

In reaching this conclusion, the Court of Appeals did not purport to be correcting a legal error, nor did it refer to or expressly apply the clearly-erroneous standard.

Third, in considering the "genesis" of the system, the Court of Appeals held that the District Court erred in holding that the motives of IAM were not relevant.[13] This was the correction of a legal error on the part of the District Court in excluding relevant evidence. The court did not stop there, however. It went on to hold that IAM was acting out of discriminatory intent—an issue specifically not reached by the District Court—and that "considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." *Ibid.*

Fourth, despite this conclusion under the third *James* factor the Court of Appeals then recited, but did not expressly set aside or find clearly erroneous, the District Court's findings with respect to the negotiation and maintenance of the seniority system.

The court then announced that "[h]aving carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is 'bona fide' within the meaning of § 703(h) of Title VII, we reject the district court's finding." 624 F.2d, at 533. Elaborating on its disagreement, the Court of Appeals stated:

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13 The original complaint in this case did not mention IAM. Prior to the first trial, respondents sought and received leave to amend their complaint to add IAM as a Rule 19 defendant, "insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company." Order of the District Court, June 4, 1974 (App. 29).

"An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made. There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I. A. M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I. A. M. and U.S. W. resulted in an all-white I. A. M. unit. The U.S. W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.

"The district court might have reached a different conclusion had it given the I. A. M.'s role in the creation and establishment of the seniority system its due consideration." *Ibid.* (footnote omitted).

Having rejected the District Court's finding, the court made its own findings as to whether the USW seniority system was protected by § 703(h):

"We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U.S. W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U.S. C. § 2000e-2(h)." *Id.*, at 533-534.

In connection with its assertion that it was convinced that a mistake had been made, the Court of Appeals, in a footnote,

referred to the clearly-erroneous standard of Rule 52(a). *Id.*, at 533, n. 6.[14] It pointed out, however, that if findings "are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand." *Ibid.* Finally, quoting from *East* v. *Romine, Inc.*, 518 F.2d 332, 339 (CA5 1975), the Court of Appeals repeated the following view of its appellate function in Title VII cases where purposeful discrimination is at issue:

> " 'Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S. C. A. § 2000e-2(a). As such, a finding of discrimination or non-discrimination is a finding of ultimate fact. [Cites omitted.] In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.' " 624 F.2d, at 533, n. 6.

III

Pointing to the above statement of the Court of Appeals and to similar statements in other Title VII cases coming from that court,[15] petitioners submit that the Court of Appeals made an

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14 In *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), this Court characterized the clearly-erroneous standard as follows: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We note that the Court of Appeals quoted this passage at the conclusion of its analysis of the District Court opinion. *Supra*, at 283.

15 See *Jackson* v. *City of Killeen*, 654 F.2d 1181, 1184 (1981); *Payne* v. *McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1147 (1981); *Wilkins* v. *University of Houston*, 654 F.2d 388, 390 (1981); *Lindsey* v. *Mississippi Research & Development Center*, 652 F.2d 488, 492 (1981); *Rohde* v. *K. O. Steel Castings, Inc.*, 649 F.2d 317, 320 (1981); *Joshi* v. *Florida State University*, 646 F.2d 981, 986 (1981); *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, 1024 (1981); *Danner* v. *United States Civil Service Comm'n*, 635 F.2d 427, 430-431 (1981); *Thompson* v. *Leland Police Dept.*, 633 F.2d 1111,

independent determination of discriminatory purpose, the "ultimate fact" in this case, and that this was error under Rule 52(a). We agree with petitioners that if the Court of Appeals followed what seems to be the accepted rule in that Circuit, its judgment must be reversed.[16]

1112 (1980); *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1311 (1980); *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 566 (1979); *Williams* v. *Tallahassee Motors, Inc.*, 607 F.2d 689, 690 (1979); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (1978); *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-421 (1975); *East* v. *Romine, Inc.*, 518 F.2d 332, 338-339 (1975).

16 There is some indication in the opinions of the Court of Appeals for the Fifth Circuit (see n. 15, *supra*) that the Circuit rule with respect to "ultimate facts" is only another way of stating a standard of review with respect to mixed questions of law and fact—the ultimate "fact" is the statutory, legally determinative consideration (here, intentional discrimination) which is or is not satisfied by subsidiary facts admitted or found by the trier of fact. As indicated in the text, however, the question of intentional discrimination under § 703(h) is a pure question of fact. Furthermore, the Court of Appeals' opinion in this case appears to address the issue as a question of fact unmixed with legal considerations.

At the same time, this Court has on occasion itself indicated that findings on "ultimate facts" are independently reviewable. In *Baumgartner* v. *United States*, 322 U.S. 665 (1944), the issue was whether or not the findings of the two lower courts satisfied the clear-and-convincing standard of proof necessary to sustain a denaturalization decree. The Court held that the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could independently assess. The Court referred to the finding as one of "ultimate" fact, which in that case involved an appraisal of the strength of the entire body of evidence. The Court said that the significance of the clear-and-convincing proof standard "would be lost" if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts not open to review here." *Id.*, at 671.

The Fifth Circuit's rule on appellate consideration of "ultimate facts" has its roots in this discussion in *Baumgartner*. In *Galena Oaks Corp.* v. *Scofield*, 218 F.2d 217 (CA5 1954), in which the question was whether the gain derived from the sale of a number of houses was to be treated as capital gain or ordinary income, the Court of Appeals relied directly on *Baumgartner* in holding that this was an issue of "ultimate fact" that an appellate court may review free of the clearly-erroneous rule. *Causey* v. *Ford Motor Co.*, *supra*, at 421, relying on *Galena Oaks Corp.* v. *Scofield*, *supra*, said that "although

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

The Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination.[17] It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact.

The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. See

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discrimination *vel non* is essentially a question of fact, it is, at the same time, the ultimate issue for resolution in this case" and as such, was deemed to be independently reviewable. The passage from *East* v. *Romine, Inc., supra*, at 339, which was repeated in the cases before us now, *supra*, at 285, rested on the opinion in *Causey* v. *Ford Motor Co.*

Whatever *Baumgartner* may have meant by its discussion of "ultimate facts," it surely did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a). *Baumgartner's* discussion of "ultimate facts" referred not to pure findings of fact—as we find discriminatory intent to be in this context—but to findings that "clearly impl[y] the application of standards of law." 322 U.S. at 671.

17 As we noted above, the Court of Appeals did at certain points purport to correct what it viewed as legal errors on the part of the District Court. The presence of such legal errors may justify a remand by the Court of Appeals to the District Court for additional factfinding under the correct legal standard. *Infra*, at 291-292.

Baumgartner v. *United States*, 322 U.S. 665, 671 (1944). Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion. For the reasons that follow, however, we have little doubt about the factual nature of § 703(h)'s requirement that a seniority system be free of an intent to discriminate.

Treating issues of intent as factual matters for the trier of fact is commonplace. In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534 (1979), the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly-erroneous rule. In *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), the Court held that the principal criterion for identifying a gift under the applicable provision of the Internal Revenue Code was the intent or motive of the donor—"one that inquires what the basic reason for his conduct was in fact." *Id.*, at 286. Resolution of that issue determined the ultimate issue of whether a gift had been made. Both issues were held to be questions of fact subject to the clearly-erroneous rule. In *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949), an antitrust case, the Court referred to "[f]indings as to the design, motive and intent with which men act" as peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52.

Justice Black's dissent in *Yellow Cab* suggested a contrary approach. Relying on *United States* v. *Griffith*, 334 U.S. 100 (1948), he argued that it is not always necessary to prove "specific intent" to restrain trade; it is enough if a restraint is the result or consequence of a defendant's conduct or business arrangements. Such an approach, however, is specifically precluded by § 703(h) in Title VII cases challenging seniority systems. Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate. It would make no sense, therefore, to say that the intent to discriminate required by § 703(h) may be presumed from such an impact. As § 703(h) was construed in *Teamsters*, there must be a finding of actual

intent to discriminate on racial grounds on the part of those who negotiated or maintained the system. That finding appears to us to be a pure question of fact.

This is not to say that discriminatory impact is not part of the evidence to be considered by the trial court in reaching a finding on whether there was such a discriminatory intent as a factual matter.[18] We do assert, however, that under § 703(h) discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent.[19] Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Insofar as the Fifth Circuit assumed otherwise, it erred.

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18 See, *e.g.*, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 580 (1978): "Proof that [an employer's] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided."

19 "We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—*i.e.*, questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the Circuits on both sides of this question. Compare *United States ex rel. Johnson* v. *Johnson*, 531 F.2d 169, 174, n. 12 (CA3 1976); *Stafos* v. *Jarvis*, 477 F.2d 369, 372 (CA10 1973); and *Johnson* v. *Salisbury*, 448 F.2d 374, 377 (CA6 1971), with *Rogers* v. *Bates*, 431 F.2d 16, 18 (CA8 1970); and *Pennsylvania Casualty Co.* v. *McCoy*, 167 F.2d 132, 133 (CA5 1948). There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court, *e.g.*, *Bogardus* v. *Commissioner*, 302 U.S. 34, 39 (1937); *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937); *Helvering* v. *Rankin*, 295 U.S. 123, 131 (1935). But cf., *Commissioner* v. *Duberstein*, 363 U.S. 278, 289 (1960); *Commissioner* v. *Heininger*, 320 U.S. 467, 475 (1943).

IV

Respondents do not directly defend the Fifth Circuit rule that a trial court's finding on discriminatory intent is not subject to the clearly-erroneous standard of Rule 52(a).[20] Rather, among other things, they submit that the Court of Appeals recognized and, where appropriate, properly applied Rule 52(a) in setting aside the findings of the District Court. This position has force, but for two reasons it is not persuasive.

First, although the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a), the acknowledgement came late in the court's opinion. The court had not expressly referred to or applied Rule 52(a) in the course of disagreeing with the District Court's resolution of the factual issues deemed relevant under *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (1977).[21] Furthermore, the paragraph in which the court finally concludes that the USW seniority system is unprotected by § 703(h) strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record.

Second and more fundamentally, when the court stated that it was convinced that a mistake had been made, it then identified not only the mistake but also the source of that mistake. The mistake of the District Court was that on the record there could be no doubt about the existence of a discriminatory purpose. The source of the mistake was the District Court's failure

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20 Neither does the dissent contend that Rule 52(a) is inapplicable to findings of discriminatory intent. Rather, it contends, that the Rule was properly applied by the Court of Appeals.

21 In particular, in regard to the second *James* factor—whether the departmental structure was rational or in line with industry practice—the Court of Appeals did not focus on the evidentiary basis for any particular finding of the District Court. It appeared to make an independent examination of the record and arrive at its own conclusion contrary to that of the District Court. Likewise, in dealing with the genesis of the seniority system and whether or not the negotiation or maintenance of the system was tainted with racial discrimination, the Court of Appeals, while identifying what it thought was legal error in failing to consider the racial practices and intentions of IAM, did not otherwise overturn any of the District Court's findings as clearly erroneous.

to recognize the relevance of the racial purposes of IAM. Had the District Court "given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration," it "might have reached a different conclusion." *Supra*, at 284.

When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:

> "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *DeMarco* v. *United States*, 415 U.S. 449, 450, n. (1974).[22]

Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974). All of this is elementary. Yet the Court of Appeals, after holding that the District Court had failed to consider relevant evidence and indicating that the District Court might have come to a different conclusion had it considered that evidence, failed to remand for further proceedings as to the intent of IAM and the significance, if any, of such a finding with respect to the intent of USW itself. Instead, the Court of Appeals made its own determination as to the motives of IAM, found that USW had acquiesced in the IAM conduct, and apparently concluded that the

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22 See 5A J. Moore & J. Lucas, Moore's Federal Practice § 52.06[2] (1982) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made"); *Rule* v. *International Assn. of Bridge Workers*, 568 F.2d 558, 568 (CA8 1978); *Chicano Police Officer's Assn.* v. *Stover*, 552 F.2d 918, 921 (CA10 1977); *O'Neal* v. *Gresham*, 519 F.2d 803, 805 (CA4 1975); *Burch* v. *International Assn. of Machinists & Aerospace Workers, AFL-CIO*, 433 F.2d 561 (CA5 1970); *General Electric Credit Corp.* v. *Robbins*, 414 F.2d 208 (CA8 1969).

foregoing was sufficient to remove the system from the protection of § 703(h).[23]

Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. As we have previously said, however, the premise for this conclusion is infirm: whether an ultimate fact or not, discriminatory intent under § 703(h) is a factual matter subject to the clearly-erroneous standard of Rule 52(a). It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, concurring in part.

Except to the extent that the Court's preliminary comments on the burden of sustaining "any challenge to a seniority system under Title VII," *ante*, at 277, are inconsistent with the views I expressed separately in *American Tobacco Co.* v. *Patterson*, *ante*, p. 86, I join the Court's opinion.

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23 IAM's discriminatory motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in these cases. A discriminatory intent on the part of IAM, therefore, does not control the outcome of these cases. Neither does the fact, if true, that USW acquiesced in racially discriminatory conduct on the part of IAM. Such acquiescence is not the equivalent of a discriminatory purpose on the part of USW.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins except as to Part I, dissenting.

In 1971, a group of Negro employees at Pullman-Standard's Bessemer, Ala., plant brought this class action against Pullman-Standard, the United Steelworkers of America and its Local 1466 (USW), and the International Association of Machinists and its Local 372 (IAM). The plaintiffs alleged, *inter alia*, that the departmental seniority system negotiated by both unions discriminated against Negroes in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976 ed. and Supp. IV), and the Civil Rights Act of 1866, 42 U.S.C. § 1981. In 1974, the District Court for the Northern District of Alabama concluded that the seniority system did not operate to discriminate against Negroes. A unanimous panel of the Fifth Circuit reversed. The court ruled that the District Court had committed several errors of law, including failure to give proper weight to the role of the IAM, and had relied on patently inaccurate factual conclusions. *Swint* v. *Pullman-Standard*, 539 F.2d 77, 95-96 (1976). On remand, the District Court again ruled that the seniority system was immune from attack under Title VII, this time finding that respondents had failed to show discriminatory intent as required by this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977). *Ante*, at 275. The Fifth Circuit again unanimously rejected the conclusion of the District Court. 624 F.2d 525 (1980). The majority now reverses the Fifth Circuit's second unanimous decision on the ground that the Court of Appeals did not pay sufficient homage to the "clearly erroneous" rule, Fed. Rule Civ. Proc. 52(a), in concluding that the seniority system at Pullman-Standard was the product of intentional discrimination against Negroes. Because I cannot agree with the premise of the majority's decision to remand these cases for yet another trial, or with its application of that premise to the facts of this case, I respectfully dissent.

I

The majority premises its holding on the assumption that " 'absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.' " *Ante*, at 277, quoting *Trans World Airlines Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). As I have previously indicated, I do not find anything in the relevant statutory language or legislative history to support the proposition that § 703(h) of Title VII immunizes a seniority system that perpetuates past discrimination, as the system at issue here clearly does, simply because the plaintiffs are unable to demonstrate to this Court's satisfaction that the system was adopted or maintained for an invidious purpose. See *Teamsters* v. *United States*, *supra*, at 377-394 (opinion of MARSHALL, J.). In my opinion, placing such a burden on plaintiffs who challenge seniority systems with admitted discriminatory impact, a burden never before imposed in civil suits brought under Title VII, frustrates the clearly expressed will of Congress and effectively "freeze[s] an entire generation of Negro employees into discriminatory patterns that existed before the Act." *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 516 (ED Va. 1968) (Butzner, J.).

II

Even if I were to accept this Court's decision to impose this novel burden on Title VII plaintiffs, I would still be unable to concur in its conclusion that the Fifth Circuit's decision should be reversed for failing to abide by Rule 52(a). The majority asserts that the Court of Appeals in this action ignored the clearly-erroneous rule and made an independent determination of discriminatory purpose. I disagree. In my view, the court below followed well-established legal principles both in rejecting the District Court's finding of no discriminatory purpose and in concluding that a finding of such a purpose was compelled by all of the relevant evidence.

The majority concedes, as it must, that the "Court of Appeals acknowledged and correctly stated the controlling

standard of Rule 52(a)." *Ante*, at 290. In a footnote to its opinion, the Court of Appeals plainly states that findings of fact may be overturned only if they are either "clearly erroneous" or "made under an erroneous view of controlling legal principles." 624 F.2d, at 533, n. 6. Furthermore, as the majority notes, *ante*, at 283, the Court of Appeals justified its decision to reject the District Court's finding that the seniority system was not the result of purposeful discrimination by stating: "An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the *definite and firm conviction that a mistake has been made.*" 624 F.2d, at 533 (emphasis added: footnote omitted).[1] I frankly am at a loss to understand how the the Court of Appeals could have expressed its conclusion that the District Court's finding on the issue of intent was clearly erroneous with any more precision or clarity.

The majority rejects the Court of Appeals' clear articulation and implementation of the clearly-erroneous rule on the apparent ground that in the course of correctly setting forth the requirements of Rule 52(a), the court also included the following quotation from its prior decision in *East* v. *Romine, Inc.*, 518 F.2d 332, 339 (1975):

> " 'Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. [Cites omitted]. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.' " 624 F.2d, at 533, n. 6.

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1 As the majority acknowledges, *ante*, at 284-285, n. 14, this Court stated in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), that a finding of fact is clearly erroneous if "the reviewing court on the entire evidence is left with *the definite and firm conviction that a mistake has been committed*" (emphasis added).

The only question presented by this case, therefore, is whether this reference to *East* v. *Romine, Inc.*, should be read as negating the Court of Appeals' unambiguous acknowledgement of the "controlling standard of Rule 52." *Ante*, at 290. The majority bases its affirmative answer to that question on two factors. First, the majority contends that the Court of Appeals must not have properly respected the clearly-erroneous rule because its acknowledgment that Rule 52(a) supplied the controlling standard "came late in the court's opinion." *Ante*, at 290. Second, the Court of Appeals "identified not only the mistake" that it felt had been made, "but also the source of that mistake." *Ante*, at 291. If the Court of Appeals had really been applying the clearly-erroneous rule, it should have abided by the "usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Ante*, at 293.

Neither of these arguments justifies the majority's conclusion that these cases must be remanded for a fourth trial on the merits. I am aware of no rule of decision embraced by this or any other court that places dispositive weight on whether an accurate statement of controlling principle appears "early" or late in a court's opinion. Nor does the majority suggest a basis for this unique rule of interpretation. So long as a court acknowledges the proper legal standard, I should think it irrelevant whether it chooses to set forth that standard at the beginning or at the end of its opinion. The heart of the majority's argument, therefore, is that the failure to remand the action to the District Court after rejecting its conclusion that the seniority system was "bona fide" within the meaning of § 703(h) indicates that the Court of Appeals did not properly follow the clearly-erroneous rule. Before addressing this issue, however, it is necessary to examine the nature of the finding of "intent" required by this Court in *Teamsters*, the procedure that courts of appeals should follow in reviewing a district court's finding on intent, and the extent to which the court below adhered to that procedure in this case.

The District Court examined the four factors approved by the Fifth Circuit in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (1977), cert. denied, 434 U.S. 1034 (1978), to deter-

mine whether the departmental seniority system at Pullman-Standard was adopted or maintained for a discriminatory purpose. Although indicating that these four factors are not the only way to demonstrate the existence of discriminatory intent,[2] the Court today implicitly acknowledges that proof of these factors satisfies the requirements of *Teamsters*.[3] In particular, the majority agrees that a finding of discriminatory intent sufficient to satisfy *Teamsters* can be based on circumstantial evidence, including evidence of discriminatory impact. See *ante*, at 289; see also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 267 (1977).

Given the nature of this factual inquiry, the court of appeals must first determine whether the district court applied correct legal principles and therefore *considered* all of the legally relevant evidence presented by the parties. This, as the majority acknowledges, is a "legal" function that the court of appeals must perform in the first instance. *Ante*, at 282, 283. Second, the court of appeals must determine whether the district court's finding with respect to intent is *supported* by all of the legally relevant evidence. This, the Court holds today, is generally a factual determination limited by the dictates of Rule 52(a). Finally, if the court of appeals sets aside the district court's finding with respect to intent, either because that finding is clearly erroneous or because it is based on an erroneous legal standard, it may determine, in the interest of judicial economy, whether the legally relevant evidence presented to the district court "permits only one resolution of the factual issue." *Ante*, at 292. If only one conclusion is possible, the reviewing court is free to find the existence of the fact in question as a matter of

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2 Contrary to the majority's suggestion, *ante*, at 279, n. 8, I find nothing in the Fifth Circuit's decision in *James* v. *Stockham Valves & Fittings Co.* to imply that these factors constitute the only relevant criteria for determining discriminatory intent.

3 This conclusion would seem to be compelled since, as the majority notes, the *James* factors are nothing more than a summary of the criteria examined by this Court in *Teamsters*, 431 U.S. at 355-356.

law. See *Bigelow* v. *Virginia*, 421 U.S. 809, 826-827 (1975); *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967).

A common-sense reading of the opinion below demonstrates that the Court of Appeals followed precisely this course in examining the issue of discriminatory intent. Even the majority concedes that the Court of Appeals determined that the District Court committed "legal error" by failing to consider all of the relevant evidence in resolving the first and the third *James* factors. *Ante*, at 282, 283. With respect to the first *James* factor—whether the system inhibits all employees equally from transferring between seniority units—the District Court found that the departmental system "locked" both Negro and white workers into departments by discouraging transfers. The District Court acknowledged that Negroes might suffer a greater impact because the company's previous discriminatory policy of openly maintaining "Negro" jobs and "white" jobs had caused Negroes to be concentrated in less desirable positions. The District Court concluded, however, that this differential impact was irrelevant in determining whether the seniority system operated neutrally. The Court of Appeals properly held that the District Court erred in failing to consider the fact that the departmental system locked Negroes into less desirable jobs.

Similarly, as for the third *James* factor—whether the seniority system had its genesis in racial discrimination—the District Court rejected respondents' argument that the motives of the IAM were relevant. It concluded that the USW could not be charged with the racial bias of the IAM. The Court of Appeals held that this conclusion was erroneous because the "motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination." 624 F.2d, at 532.[4]

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4 As the majority indicates in a footnote, *ante*, at 292, n. 23, the discriminatory motive of the IAM is "relevant . . . to the extent that it may shed light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in this case." I do not read the Court of Appeals opinion in this action as holding anything more than that if

As the majority acknowledges, where findings of fact "are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand.' " *Ante*, at 285, quoting 624 F.2d at 533, n. 6; see also *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 323 (1974); *United States* v. *General Motors Corp.*, 384 U.S. 127, 141, n. 16 (1966); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194, n. 9 (1963); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 356, n. 15 (CA5 1972). Having found that the District Court's findings as to the first and third *James* factors were made under an erroneous view of controlling legal principles, the Court of Appeals was *compelled* to set aside those findings free of the requirements of the clearly-erroneous rule.[5] But once these two findings were set aside, the District Court's conclusion that the departmental system was bona fide within the meaning of § 703(h) also had to be rejected, since that conclusion was based at least in part on its erroneous determinations concerning the first and the third *James* factors.

At the very least, therefore, the Court of Appeals was entitled to remand this action to the District Court for the purpose of reexamining the bona fides of the seniority system under proper legal standards. However, as we have often noted, in some cases a remand is inappropriate where the facts on the record are susceptible to only one reasonable interpretation. See *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534-537 (1979); *Bigelow* v. *Virginia, supra*, at 826-827. In such cases, "[e]ffective judicial administration" requires that the court of appeals draw the inescapable factual conclusion itself, rather than remand the case to the district court for further needless proceedings. *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S., at

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the USW participated in establishing a system that was designed for the purpose of perpetuating past discrimination, the third *James* factor would be satisfied. Given that the IAM is a party to this litigation, its participation in the creation of the seniority system can hardly be deemed irrelevant.

5 It is therefore irrelevant that the Court of Appeals did not specifically hold that the District Court's other factual findings were clearly erroneous.

170. Such action is particularly appropriate where the court of appeals is in as good a position to evaluate the record evidence as the district court. The major premise behind the deference to trial courts expressed in Rule 52(a) is that findings of fact "depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949); see also *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952). Indeed Rule 52(a) expressly acknowledges the importance of this factor by stating that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Consequently, this Court has been especially reluctant to resolve factual issues which depend on the credibility of witnesses. See generally *United States* v. *Oregon State Medical Society, supra*, at 332.

In the cases before the Court today this usual deference is not required because the District Court's findings of fact were entirely based on documentary evidence.[6] As we noted in *United States* v. *General Motors Corp., supra*, at 141, n. 16, "the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) . . . , plays only a restricted role [in] a 'paper case.' " See also *Jennings* v. *General Medical Corp.*, 604 F.2d 1300, 1305 (CA10 1979) ("When the findings of a trial court are based on documentary, rather than oral evi-

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6 Only two witnesses testified during the brief hearing that the District Court conducted on the question whether the seniority system at Pullman-Standard was immune under § 703(h). Both of these witnesses were long-time Negro employees of Pullman-Standard who testified on behalf of *respondents* concerning racial segregation at the plant and by the USW. There is no indication in the District Court's opinion that it relied upon the testimony of these two witnesses in concluding that the system was bona fide within the meaning of § 703(h). The remainder of the record before the District Court consisted entirely of 139 exhibits submitted by respondents, the company, and the unions concerning the development and maintenance of the seniority system from 1940 through the 1970's.

dence, they do not carry the same weight on appellate review"); *Orvis* v. *Higgins*, 180 F.2d 537, 539 (CA2 1950).[7]

I believe that the Court of Appeals correctly determined that a finding of discriminatory intent was compelled by the documentary record presented to the District Court. With respect to three of the four *James* factors, the Court of Appeals found overwhelming evidence of discriminatory intent. First, in ruling that the District Court erred by not acknowledging the legal significance of the fact that the seniority system locked Negroes into the least remunerative jobs in the company, the Court of Appeals determined that such disproportionate impact demonstrated that the system did not "operat[e] to discourage all employees equally from transferring between seniority units.' " 624 F.2d at 530, quoting *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 352. Second, noting that "[n]o credible explanation ha[d] been advanced to sufficiently justify" the existence of two separate Die and Tool Departments and two separate Maintenance Departments, a condition not found at any other Pullman-Standard plant, or the creation of all-white and all-Negro departments at the time of unionization and in subsequent years, the Court of Appeals concluded that the second *James* factor had not been satisfied.[8] 624 F.2d, at 533. Finally,

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7 This is not to say that the clearly-erroneous rule does not apply to "document" cases. See *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194, n. 9 (1963). However, "when the decision of the court below rests upon an incorrect reading of an undisputed document, [the appellate] court is free to substitute its own reading of the document." *Eutectic Corp.* v. *Metco, Inc.*, 579 F.2d 1, 5 (CA2 1978). See also *McKensie* v. *Sea Land Service*, 551 F.2d 91 (CA5 1977); *Best Medium Pub. Co.* v. *National Insider, Inc.*, 385 F.2d 384 (CA7 1967), cert. denied, 390 U.S. 955 (1968); *United States ex rel. Binion* v. *O'Brien*, 273 F.2d 495 (CA3 1959), cert. denied, 363 U.S. 812 (1960).

8 Although the majority is correct in stating that the Court of Appeals did not "refer to or *expressly* apply the clearly-erroneous standard" in reaching this conclusion, *ante*, at 282 (emphasis added), the appellate court's adherence to the requirements of Rule 52(a) is nevertheless apparent from the following statement:

with respect to the third *James* factor the Court of Appeals found that once the role of the IAM was properly recognized, it was "crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." 624 F.2d, at 532.[9]

After reviewing all of the relevant record evidence presented to the District Court, the Court of Appeals concluded: "There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose." *Id.*, at 533. Because I fail to see how the Court of Appeals erred in carrying out its appellate function, I respectfully dissent from the majority's decision to prolong respondents' 11-year quest for the vindication of their rights by requiring yet another trial.

"The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty-five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on *no other considerations than the objective to separate the races.*" 624 F.2d at 531 (emphasis added).

In my opinion, this statement is sufficient to satisfy the requirements of Rule 52(a), particularly in light of the Court of Appeals' general acknowledgment that it was bound by the clearly-erroneous rule. See *supra*, at 296-297.

9 Whether or not the Court of Appeals expressly ruled on the fourth *James* factor is irrelevant. As the Court of Appeals clearly stated, its conclusion was based on "the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard." 624 F.2d at 533; see also *id.*, at 532 ("It is crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter"), and *id.*, at 533 ("We consider significant in our decision . . . conditions of racial discrimination which affected the negotiation and renegotiation of the system . . ."). Even assuming that the District Court was correct in concluding that the system had been *maintained* free of any illegal purpose, the Court of Appeals was entitled to conclude that discriminatory intent had been demonstrated on the basis of other relevant evidence.

SWINT VIII

U.S. Court of Appeals
Fifth Circuit

United States Court of Appeals,
Fifth Circuit.*

No. 78-2449.

Dec. 6, 1982

As Corrected April 4, 1983.

Louis SWINT and Willie James Johnson, on behalf of themselves and others similarly situated, Plaintiffs-Appellants,

—v.—

PULLMAN-STANDARD, Bessemer, Alabama, United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO and International Association of Machinists and Aerospace Workers, AFL-CIO, Defendants-Appellees.

Oscar W. Adams, Jr., Birmingham, Ala., Elaine R. Jones, Washington, D.C., for plaintiffs-appellants.

Michael H. Gottesman, Washington, D.C., for defendants-appellees.

Thomas, Taliaferro, Forman, Burr & Murray, Birmingham, Ala., Bernard Kleiman, Franklin B. Snyder, Chicago, Ill., Carl Frankel, Pittsburgh, Pa., for Pullman-Standard.

Cooper, Mitch & Crawford, Jerome A. Cooper, C.V. Stelzenmuller, D. Frank Davis, Birmingham, Ala., for United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO & Intern. Ass'n of Machinists & Aerospace Workers, AFL-CIO.

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* Former Fifth Circuit Case, section 9(1) of Public Law 96-452—October 14, 1980.

Appeal from the United States District Court for the Northern District of Alabama.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before RONEY and HATCHETT, Circuit Judges, and WISDOM, Senior Circuit Judge.

PER CURIAM:

This employment discrimination action's first journey to this court resulted in a remand to the district court for further proceedings with respect to Pullman-Standard's seniority system and its selection of supervisory personnel. *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir.1976). Subsequently, the district court held that the seniority system did not discriminate against blacks and was therefore bona fide under 42 U.S.C.A. § 2000e-2(h), that Pullman-Standard did not follow a discriminatory practice or policy in job assignments after the effective date of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a), and that Pullman-Standard had rebutted the plaintiffs' prima facie case of discrimination in the selection of supervisory personnel. We reversed and held that: (1) although the statistics disclosed that Pullman-Standard had made significant advancements in eliminating previous all-black and all-white departments subsequent to 1966, the total employment picture revealed that racially discriminatory assignments were made after the effective date of Title VII; (2) Pullman-Standard's department seniority system was not "bona fide" within the meaning of section 703(h) of Title VII, 42 U.S.C.A. 2000e-2(h); and (3) the plaintiffs' prima facie showing of racial discrimination in the selection of supervisory personnel had not been rebutted. *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980).

The United States Supreme Court granted certiorari to review the seniority system issue, reversed the judgment of this court, and remanded the case to us "for further proceedings consistent with this opinion." ____ U.S. ____, ____, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66, 82 (1982). Accordingly, we VACATE our judgment as to this issue and REMAND the case to the district

court for further proceedings to determine what impact the "locking-in" of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the discriminatory motivation of IAM with respect to the institution of USW's seniority system, and any other proceedings that may be deemed necessary in view of our prior opinion and that of the United States Supreme Court.

REMANDED.

SWINT IX

U.S. District Court
Northern District of Alabama

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

No. CV 71-P-0955-S

Filed September 8, 1986
Entered September 8, 1986

LOUIS SWINT, et al., *Plaintiffs,*

—VS.—

PULLMAN-STANDARD, et al., *Defendants.*

OPINION

(Pullman-Standard IX)

For decision are certain issues still at "Phase I" after fifteen years of litigation. The first trial was conducted in 1974; additional evidentiary hearings were held in 1977, 1978, and 1984. Although a detailed recital of the prior proceedings in the trial and appellate courts is unnecessary, reference must be made from time to time to these earlier opinions.[1] Pullman-Standard ceased its operations in Alabama more than five years ago; however—absent settlement or providential intervention—this litigation appears destined for yet further hearings and decisions.

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1 *Pullman-Standard I*, 11 FEP cases 943 (N.D. Ala. 1974); *Pullman-Standard II*, 539 F.2d 77 (5th Cir. 1976); *Pullman-Standard III*, 15 FEP Cases 1638 (N.D. Ala. 1977); *Pullman-Standard IV*, 15 FEP Cases (N.D. Ala. 1977); *Pullman-Standard V*, 17 FEP Cases 730 (N.D. Ala. 1978); *Pullman-Standard VI*, 624 F.2d 525 (5th Cir. 1980); *Pullman-Standard VII*, 456 U.S. 273 (1982); *Pullman-Standard VIII*, 692 F.2d 1031 (5th Cir. 1983).

I. *SCOPE OF INQUIRY.*

Before proceeding to questions of liability, the court must define the scope of this inquiry—that is, the proper anterior (beginning) and posterior (ending) cut-off dates of this liability period and the appropriate class definition.

A. *Anterior Cut-Off Date.*[2]

The question of the anterior cut-off is intertwined with, and complicated by, motions to intervene by four putative class members and the existence of a Title VII charge filed on March 27, 1967, by Commissioner Shulman of the Equal Employment Opportunity Commission. Plaintiffs contend that this intervention should be allowed, and that the anterior date should be set byEmployment
Opportunity Commission. Plaintiffs contend that this intervention should be allowed, and that the anterior date should be set by reference to the EEOC charge filed on October 30, 1966, by one of the proposed intervenors, Spurgeon Seals. In the alternative, they argue that Commissioner Shulman's charge should be the date designator. Defendants maintain that the anterior date should be measured by reference to October 15, 1969, the filing date of the charge of Louis Swint, the named plaintiff and class representative during the past 15 years. The court agrees with the defendants.[3]

Some factual background is necessary for an understanding of the attempted intervention. On December 9, 1975, a separate suit was filed in this district by William Larkin, Spurgeon Seals, Edward Loftin, and Jesse Terry against Pullman-Standard for redress of alleged Title VII violations. *Pullman-Standard I* was already on appeal to the Fifth Circuit at the time this new suit (*Larkin*) was filed. On January 20, 1976, *Larkin* was dismissed by the judge to whom it had been assigned, holding that the plaintiffs were putative class members in *Pullman-Standard*

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2 Typically, the anterior cut-off for class membership and for the liability period are the same. Case law referring to the beginning date of membership in a class usually also refers to the beginning of the liability period and is relevant to the instant discussion.

3 The Fifth Circuit has succinctly stated the law: "The opening date for membership in a class for a Title VII claim should be set by reference to the earliest charge filed by a named plaintiff." *Payne v. Travenol Laboratories*, 673 F.2d 798, 813 (5th Cir. 1982).

and that their interests were adequately protected by class representatives in *Pullman-Standard*. Eight years later, on March 23, 1984, the plaintiffs in *Larkin* filed a motion to alter or clarify this dismissal. The motion was denied on April 16, 1984, with the judge adhering to his prior ruling and rationale.

On June 4, 1984, Larkin, Seals, Lofton, and Terry moved to intervene in the present case. This motion was denied on September 4, 1984.[4]

Intervention under Rule 24 of the Federal Rules of Civil Procedure, whether "of right" or "permissive," may be granted only upon "timely application." The rule is silent as to what constitutes a timely application, and this determination has long been held to be within the sound discretion of the trial court. *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1071 (5th Cir. 1970). The court must balance the competing interests of the parties and weigh any possible prejudicial effects intervention would create. With respect to permissive intervention, the court is explicitly directed to "consider whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties." FED. R. CIV. P. 24(b). This consideration is primary in the court's determination. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1913. All circumstances of the case are to be examined, particularly whether the would-be intervenor was in a position to have requested intervention at any earlier time. *Id.* at §§ 1913, 1916.[5]

In the case at bar, the would-be intervenors were explicitly informed by the opinion issued in *Larkin* on January 20, 1976, of the existence of *Pullman-Standard* and of their interest in it.[6]

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4 At the same time, the court denied a motion that had been filed on February 24, 1984, seeking to designate Seals as a class representative in *Pullman-Standard*, even though at the time he was neither a party nor an intervenor.

5 *See also Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125 (5th Cir. 1970).

6 The court here picks a date certain, although, in all likelihood, the intervenors knew of *Pullman-Standard* and their interest in it no later than

No attempt was made to intervene in *Pullman-Standard* until 1984, after the case had twice been resubmitted for final decision. In light of the would-be intervenors' knowledge, eight years is an unreasonable time to delay in taking action purportedly necessary to protect their rights. Such a belated effort is untimely by the most lenient standards. Even absent any legal bar to such an attempt, the equitable concept of laches dictates that the motion be denied. Inexcusable delay, lack of diligence, and prejudice to the defendants justify this application of laches. *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 373 (1977).

Allowing intervention would arguably broaden the temporal scope of the case, potentially increasing the liability of the defendants fifteen years after the case was filed. There has been no showing that denial of intervention would unfairly prejudice the would-be intervenors, who, as the case now stands, are class members whose interests are being adequately protected by the class representatives. They will hardly be deprived of their "day in court," as plaintiffs contend. The intervention motions were made only after the original plaintiffs had secured a partial decision in favor of the class; absent a showing of significant prejudice to the applicants and sound justification for their inordinate delay in seeking intervention, the court finds no basis for granting such motions.

Plaintiffs have alternatively moved that EEOC Commissioner Shulman's charge of March 27, 1967, be used as the date designator for beginning the period of liability. This motion should likewise be denied.

Although the Commissioner's charge did allege some of the same violations of Title VII as are alleged in the instant case, it did not list any of the named plaintiffs or would-be intervenors

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the date the *Larkin* complaint was filed. Their attorneys were the same as those for plaintiffs in *Pullman-Standard*, and these attorneys obviously had knowledge of the relation between the two cases. The court, however, will not indulge in speculation as to what information was communicated between attorneys and clients, but will make findings only on that evidence which is squarely before it.

as aggrieved or charging parties.[7] It did not progress beyond internal EEOC level. There were findings of fact issued[8] and an EEOC decision made which found reasonable cause to believe that respondents had engaged in unlawful employment practices.[9]

A decision finding reasonable cause under the then-existing EEOC guidelines meant only that the matter merited an attempt to conciliate, not that it was substantial enough to be litigated.[10] 145 BNA Daily Labor Report, E-1, *et seq.* (July 27, 1977). No evidence was presented at any of the hearings before this court to show that this charge proceeded beyond this point. No evidence of conciliation or recommendation to the Attorney General to litigate the cause was brought forth.[11]

The EEOC has sought neither litigation of the Commissioner's charge nor intervention in the case *sub judice*.[12] It is only at

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7 The Commissioner's charge, as such, was never introduced into evidence. The findings of fact and the EEOC decision based on it were.

8 The findings of fact were entered into evidence as Plaintiff's Exhibit 60 in the 1974 hearing. Pullman-Standard and the USW Local and AFL-CIO were named as respondents. These findings, although of evidentiary value, are not binding on the court in its *de novo* consideration of a Title VII action. *See also* EEOC Decision 72-1704, page 3.

9 The decision was entered into evidence as Plaintiff's Exhibit 58. For purposes of rendering a decision, the EEOC consolidated Commissioner Shulman's charges and the charges filed by Terry, Lofton, Seals, and Larkin.

10 On July 20, 1977, the EEOC adopted a resolution modifying this policy. The standard of review was changed so that a finding of reasonable cause was thenceforth to indicate that a claim merited litigation if conciliation failed. The decision whether to litigate was to be made by the Commission. EEOC Compliance Manual § 30.1.

11 At the time this charge was filed, the EEOC did not have the power to bring suit *eo nomine*, but it did have the authority to recommend the filing of suit by the Attorney General of the United States. Public Law 88-352. § 705(g)(6) of the Civil Rights Act of 1964.

12 Under the present law, the EEOC's power to bring suit is not subject to statutory time limitations. 42 U.S.C. § 2000e-5(f)(1), as amended. *See Occidental Life Insurance Company v. EEOC*, 432 U.S. 355 (1977); *EEOC*

plaintiff's instance that this charge has been raised for the court's consideration. Plaintiff's motion on this point is without merit. The Commissioner's charge is analogous to a private EEOC charge which was not pursued through the administrative process into the courts. It retains no legal significance and has no bearing on the instant case's temporal boundaries. It has died of old age and neglect.

Having decided that Louis Swint's charge of October 15, 1969, controls the anterior cut-off in this suit, the court must now decide how many days prior to this charge the liability period will include. The law as originally enacted provided a ninety-day period. Public Law 88-352, Civil Rights Act of 1964. An amendment enacted on March 24, 1972, extended this period to 180 days. 42 U.S.C. 2000e-5(e).

Swint's charge was filed on October 15, 1969, and the EEOC issued a right-to-sue letter on September 21, 1971. The charge did not complain of a violation occurring within 180 days of enactment of the 1972 amendment nor was it pending before the EEOC on or after the amendment's enactment.[13]

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v. Guaranty Savings & Loan Association, 561 F.2d 1135, 1137 (5th Cir. 1977); *EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 457 (5th Cir. 1975). The court, however, does maintain the authority to reach a just result where defendant would be prejudiced by plaintiff's inordinate delay in bringing suit. This inherent power of the court applies to actions involving the EEOC just as it does to suits by private litigants. *Occidental Life*, 432 U.S. at 373. An attempt by EEOC to bring suit to intervene at this point would be viewed as untimely by the court.

13 Section 14 of Public Law 92-261 provided that: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to the charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter."

The bare language of the 1972 amendment has been broadened somewhat by judicial interpretation in regard to what constitutes a timely complaint. The Supreme Court has allowed an action filed 180 days after the alleged violation to go forward, because it occurred within 180 days prior to the effective date of the amendment. The law at the time of filing required filing within 90 days of the violation. *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976). The Ninth Circuit has held that it was not critical for the alleged violation to have

In the opinion of the court, the proper anterior cut-off is ninety days prior to the filing of Swint's EEOC charge.[14] Accordingly, the period of potential of liability commenced July 17, 1969.

B. *Posterior Cut-Off.*

In its 1980 opinion, the Fifth Circuit of Appeals found liability on certain class claims but did not define the liability periods.[15] *Pullman-Standard VI*, 624 F.2d 525 (5th Cir. 1980). In 1983, the Circuit remanded the cause to this court for proceedings in conformity with its 1980 opinion and the intervening Supreme Court opinion. *Pullman-Standard VIII*, 692 F.2d 1031; *Pullman-Standard VII*, 456 U.S. 273. Much of the task now before this court is to determine the ending dates for violations found to exist by the Circuit.

In the pretrial order of September 19, 1983, this court rejected defendants' position that claims of liability after 1974 were untenable. The plaintiffs were allowed at the 1984 hearing to present evidence of liability up to the date of that hearing.

Due to the complexity of the case, the court must determine appropriate posterior cut-off dates for each class claim separately. This issue will be addressed on that basis in subsequent portions of this opinion.

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occurred within 180 days of the amendment if the charge were still pending before the EEOC on or after the amendment's effective date. *Inda v. United Airlines*, 565 F.2d 554 (9th Cir. 1977).

The question here, however, is not whether Swint's complaint was timely filed. The class's temporal scope cannot be expanded by an attempt to analogize these holdings to the situation now before the court.

14 *See Payne v. Travenol Laboratories*, 673 F.2d 798 (5th Cir. 1982).

15 The Supreme Court subsequently granted certiorari regarding the bona fides of the seniority system and reversed the Fifth Circuit on its finding of liability on that issue. *Pullman-Standard VII*, 456 U.S. 273 (1982). The seniority system issue is before the court for determination of liability. The period of liability would need to be defined if liability were found.

C. *Class Definition.*

The class definition established in the pretrial order of June 5, 1974, remains in effect. The order stated that "[T]his action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to any charges under Title VII) been employed by defendant company as production or maintenance employees represented by the United Steelworkers."[16]

II. *DISCRIMINATORY SELECTION OF SUPERVISORY PERSONNEL*

The Court of Appeals in *Pullman-Standard VI* reversed this court's finding that the company had successfully rebutted plaintiff's prima facie case of racial discrimination in the selection of supervisory personnel after the effective date of Title VII. This ruling was not reviewed by the Supreme Court in *Pullman-Standard VII* or vacated by the appellate court in *Pullman-Standard VIII*[17]. Accordingly, it is to be treated, despite the company's protest, as the law of the case. At the 1984 hearing, no additional evidence was offered with respect to claims of discrimination in the appointment of supervisory personnel after 1974, and the court accordingly denied any claim with respect to this issue after that point. 1984 Hearing Transcript, Vol. I, 5. As to these claims, therefore, the defendant company is subject to liability upon proof of damages at a Phase II hearing for the period from July 17, 1969, until August 16, 1974.

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16 Arguably, this definition should be redrafted to conform to the limits imposed by the court's rulings regarding the cut-off dates. The result, however, would be the same with or without this change. Limits on recovery by members of the class are clearly laid out in the body of this opinion. As this case moves into Phase II, this opinion must be looked to in its entirety for limitations on the scope of liability.

17 *Pullman-Standard VI*, 624 F.2d 525 (5th Cir. 1980); *Pullman-Standard VII*, 456 U.S. 273 (1982); *Pullman-Standard VIII*, 692 F.2d 1031 (5th Cir. 1983).

III. *SENIORITY SYSTEM.*

Pursuant to the opinions of the Supreme Court in *Pullman-Standard VII* and the Fifth Circuit in *Pullman-Standard VIII*, this court has considered afresh the bona fides of the United Steel Workers' seniority system at Pullman-Standard.[18] A three-day evidentiary hearing was held in 1984 to allow the presentation of exceptional additional evidence and newly discovered evidence. A broad range of evidence was presented. Anecdotal and expert witnesses testified; statistical exhibits and depositions were received. Post-trial briefs were submitted. The evidence introduced at this hearing, as well as the evidence previously in the record, has been considered by the court in making its determination regarding the validity of the seniority system. The essential facts relating to this seniority system were outlined in *Pullman-Standard V*, 17 FEP Cases at 732-39, and need not be repeated, but are adopted by reference as findings of the court.

The Fifth Circuit specifically instructed this court to address the effect of the IAM's discriminatory motivation on the institution of USW's seniority system.[19] Plaintiffs argue that the racial animus of the IAM should be imputed to the USW. Such a finding would be contrary to the evidence taken as a whole. The IAM's discriminatory behavior is detailed in *Pullman-Standard V*.[20] In addition to the evidence discussed therein,

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18 The Supreme Court reversed the Fifth Circuit's judgment regarding the bona fides of the seniority system, and remanded the case to that court for further proceedings consistent with the Supreme Court opinion. *Pullman-Standard VII*, 456 U.S. 273 (1982). The Fifth Circuit, in turn, vacated its prior judgment regarding this issue, and remanded the case to this court "for further proceedings to determine what impact the 'locking-in' of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the discriminatory motivations of IAM with respect to the institution of USW's system . . . ." *Pullman-Standard VIII*, 692 F.2d U.S. at 1031-32.

19 *Pullman-Standard VIII*, 692 F.2d 1031 (5th Cir. 1983).

20 17 FEP 730 (N.D.Ala. 1978). In addition to the conduct described therein, the IAM also followed a policy under its printed ritual (in effect until 1948) of allowing only "qualified white candidates" to be proposed for membership. Joint Appendix to Writs for Certiorari, 346. (Plaintiffs' request for judicial notice of adjudicative facts).

extensive testimony and deposition evidence were presented at the 1984 hearing which established that blacks were involved in the formation of the USW and the negotiation of its 1954 contract.[21] The evidence, both at the 1984 hearing and at earlier hearings, indicates that the USW desired to represent all maintenance and production workers at Pullman-Standard regardless of race. The IAM's motives cannot fairly be imputed to the USW. Even if USW's acquiescence in IAM's discriminatory conduct were shown, it would not be equivalent to discriminatory purpose on the part of the USW. *Pullman-Standard VII*, 456 U.S. at 293, n.23.

In *Pullman-Standard VII*, the United States Supreme Court stated the applicable standard regarding discriminatory intent:

> Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate. It would make no sense, therefore, to say that the intent to discriminate required by Section 703(h) may be presumed from such an impact. As Section 703(h) was construed in Teamsters, there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system. That finding appears to us to be a pure question of fact.

Pullman-Standard VII, 456 U.S. at 80. This court finds no intent to discriminate on the part of the USW.[22]

The Fifth Circuit further instructed this court "to determine what impact the 'locking-in' of blacks to the least remunerative department had on discouraging transfer between seniority units." *Pullman-Standard VIII*, 692 F.2d at 1031. The Fifth

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21 Deposition of Joseph Jeneske, USW international representative at the 1954 contract negotiations. Defendants' Exhibit 1301, 1984 Hearing. *See also* Hearing Transcript, Vol. II, 4-5. Rosters of USW officers from 1965 through 1973 showed extensive involvement of blacks in leadership of the union. Joint Appendix for Writs of Certiorari, 66-89 (copy of Co. Ex. 309). Also, the anecdotal evidence throughout this case's long history has alluded repeatedly to blacks' active role in the formation and leadership of the union.

22 Inequities did exist, but the court finds that they resulted ultimately from the initial assignments made by the company.

Circuit had previously concluded that the assignment of blacks in a racially discriminatory manner to the least remunerative departments did not cease on the effective date of Title VII. *Pullman-Standard VI*, 624 F.2d 525 (5th Cir. 1980). These assignments, however, were the province of the company, not the union.

Any "locking-in" effect produced by the departmental seniority system was felt equally by blacks and whites until 1972. In 1972, an agreement between the company and the Office of Federal Contract Compliance gave certain advantages to specified groups of black employees in regard to interdepartmental transfers.[23] This agreement sought to correct inequities created by discrimination in initial assignments, not inequities in the application of the seniority system. Evidence showed that reluctance to transfer between departments turned on facts extraneous to Title VII issues, such as skill levels and personal preference.

Whether a seniority system is bona fide in a Title VII context is controlled by *International Brotherhood of Teamsters v. United States*.[24] That case applied a four-pronged test to the seniority system under scrutiny.[25] In *Pullman-Standard V*, this court used these guidelines and considered the totality of the circumstances in its detailed analysis of the USW's system. Nothing presented at the 1984 hearing has changed the court's

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23 Memorandum of Agreement (between Pullman-Standard and the United States Department of Labor, OFCC, May 19, 1972), Defendants' Exhibit 272, 1974 Hearing.

24 431 U.S. 324 (1977).

25 At the 1984 hearing, plaintiffs attempted to embark on a new theory to invalidate the seniority system. The presentation centered on dual application of the seniority system. Plaintiffs' attorneys were permitted to voice their theory at length and to question two witnesses extensively on this issue. The court then stated, "The problem [here] is that that is the identical evidence the Court called for and heard back in 1977 and '78, and the only thing we are doing here is supplementing [the record] if there is some unusual or exceptional reason why some evidence couldn't have been received back at that time." 1984 Hearing, Transcript Vol. II, 48. Given this case's lengthy history and the ample opportunity previously afforded plaintiffs to present evidence of all types, this attempt was untimely and beyond the clearly defined scope of the 1984 hearing.

opinion that the seniority system *sub judice* is bona fide and falls within the immunity provisions of Section 703(h) of the Civil Rights Act. The defendants have successfully carried their burden of showing that the seniority system is bona fide, and that the differences caused thereunder were not the result of any intent to discriminate on the basis of race.

Having considered the totality of the evidence presented at the various hearings and all submissions of counsel, the court finds that USW's seniority system at Pullman-Standard was bona fide under the terms of Section 703(h) of the Civil Rights Act.

IV. *DISCRIMINATORY DEPARTMENTAL ASSIGNMENTS.*

The court of appeals in *Pullman-Standard VI* reversed this court's finding that the company had not made racially discriminatory initial job assignments after the effective date of Title VII.[26] This ruling was not reviewed by the Supreme Court in *Pullman-Standard VII* or vacated by the appellate court in *Pullman-Standard VIII*.[27] Accordingly, it is to be treated, despite the company's protests, as the law of the case. Establishing the date this practice ceased is the task left to this court.

Both sides have presented reams of statistical evidence on this issue. The courts and legal scholars have expressed many common sense caveats concerning the use of statistics in Title VII cases. Statistics showing racial imbalance are probative of discriminatory conduct. They are not, however, irrefutable.[28] In most instances, infirmities and omissions in statistical evidence affect its probative value not its admissibility. *Bazemore v. Friday*, ____ U.S. ____, 106 S.Ct. 3000 (1986). The court should

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26 624 F.2d 525 (5th Cir. 1980).

27 *Pullman-Standard VII*, 456 U.S. 273 (1982); *Pullman-Standard VIII*, 692 F.2d 1031 (5th Cir. 1983).

28 Defendants' rebuttal may take various forms. They may impeach the reliability of the evidence, offer rebuttal evidence, or bring into question the probative value of plaintiff's evidence. *Dothard v. Rawlinson*, 433 U.S. 321, 338-39 (1977) (Rehnquist, J., concurring).

not consider statistical evidence in a vacuum,[29] and, indeed, should be cognizant of the potential for manipulation of statistics in Title VII cases. These cases all too frequently develop into "contests between college professor statisticians who revel in discoursing about advanced statistical theory." *Otero v. Mesa County Valley School District No. 51*, 470 F. Supp. 326, 331 (D.Colo. 1979), *aff'd*, 628 F.2d 1271 (10th Cir. 1980).[30] Analysis of statistical evidence requires attention to the precise questions addressed by the statistics. The limits of statistical tests in supporting causal inferences must be recognized.[31] In the case at bar, intrinsic non-quantitative evidence concerning the selection process has been considered in conjunction with the statistical evidence from both sides.

The statistical evidence was generally divided into two time periods—1964 to 1969 and 1969 to 1974. As might be expected, the defendants' and plaintiffs' experts took different statistical approaches and arrived at somewhat conflicting conclusions. The court carefully studied the evidence presented by the parties and at trial presented to the parties for their comment another standard statistical model.[32] Plaintiffs' expert acknowledged that a considerable change had taken place in the job class distribution by 1969.[33] Defendants' expert found a statistical difference between the pre-1969 and post-1969 periods, with a rough parity between the races in terms of job class assignments from 1969 forward.[34] The alternative study prepared by the

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29 *See Teamsters*, 431 U.S. at 340.

30 *See* Schlei & Grossman, *Employment Discrimination Law* (1983 Supplement, 166); Richey, Charles, *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts*, A-29 (August 1985).

31 Baldus & Cole, *Statistical Proof of Discrimination*, § 9.42. The Fifth Circuit Court of Appeals has cautioned the courts to give "close scrutiny [to the] empirical proof" on which statistical models are based. *Pettway v. American Cast Iron Co.*, 494 F.2d 211, 230-31, n.44 (5th Cir. 1974).

32 Court's Exhibit 1, 1984 Hearing.

33 1984 Hearing Transcript, Volume I, 90.

34 1984 Hearing Transcript, Volume II, 165 (testimony of Robert Herrick in reference to Company's Exhibit 1208, pages 5-7).

court indicated that post-1969 assignments were not racially tainted.

An extrinsic event ties in with and bolsters this statistical evidence as to a change in early 1969. In 1968, negotiations were begun between the company and the Department of Labor. In January 1969, the company agreed to a conditional memorandum of understanding designed to enhance opportunities for Pullman's black employees.[35] This agreement put into motion the engines of change. The company cast its contract compliance officers—one black and one white—in the role of equal employment counselors. They encouraged blacks in "low ceiling" departments to transfer to other departments, monitored the filling of temporary vacancies to insure fair allotment to blacks, and encouraged black employees and their families to take advantage of the company's vocational education tuition program.[36]

Based on the statistical and non-statistical evidence, the court finds that Pullman-Standard's practice of making racially discriminatory initial job assignments ceased as of February 1969. The changes reflected by the evidence at that point were not mere tokenism. These changes were substantial and legally significant.[37] Since the period of liability in this case does not com-

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35 This agreement was never termed official because the union never voted its approval. Nevertheless, the company put in place programs which affected real changes in policy. As was stated in *Pullman-Standard I*:

> The memorandum contained provisions similar to those later incorporated in the 1972 agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

Pullman-Standard I, 11 FEP Cases at 947, n.15.

36 The vocational education program allowed employees and their families to obtain outside training and education at the company's expense. This program was particularly significant in the training of black welders. *Id.* at 947.

37 The question of legal significance is ultimately one for the court, rather than an expert witness, to decide. The court must integrate the circum-

mence until July 17, 1969, the effect of this ruling is that the company faces no liability on these claims.

V. *CONCLUSION*

Based on the foregoing discussion, the court finds and concludes as follows:

1. The period of potential liability commenced on July 17, 1969.

2. Plaintiffs' motion that Commissioner Shulman's charge of March 27, 1967, be used as the date designator for the opening of the class is denied.

3. The class definition remains as stated in the pretrial order of June 5, 1974, but with liability periods for affected subclasses as outlined in this opinion.

4. Regarding discriminatory selection of supervisory personnel, the defendant company is subject to liability upon proof of damages at Phase II proceedings from July 17, 1969, until August 16, 1974.

5. The USW seniority system is bona fide. Judgment is entered in favor of the defendants on claims of discrimination wrought by the seniority system.

6. Regarding plaintiff's claims of racially discriminatory initial job assignments, judgment is entered in favor of defendant company.

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stances with the statistics. Mere technical statistical significance may or may not amount to legal significance, depending on the surrounding facts. Baldus & Cole, *Statistical Proof of Discrimination*, §§ 9.22, 9.41. "[T]he levels of significance required of a claimant may vary from one subject matter area to another under the same legal theory, and . . . the required level of significance is a question of law to be decided by the court and not an expert witness." *Id.* at § 9.41.

SO ORDERED.

This the 8th day of September, 1986.

/s/ SAM C. POINTER, JR.
United States District Judge

A TRUE COPY
CHARLES T. CLIVER, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

BY: /s/ SUSAN COKER
Susan Coker
Deputy Clerk

SWINT X

U.S. District Court
Northern District of Alabama

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

No. CV 71-P-0955-S

Filed November 26, 1986
Entered November 26, 1986

LOUIS SWINT, et al.,

Plaintiffs,

—vs.—

PULLMAN-STANDARD, et al.,

Defendants.

Memorandum of Opinion

This cause is before the court on a variety of post-judgment motions by both parties. All concerned would like to lay this case to its final rest, but, unfortunately, this is not yet to be. Despite the frustrations involved in taking another appeal, both sides and this court agree that appellate review and guidance would be beneficial prior to proceeding into Phase II on the issue of discriminatory supervisory promotions.

Turning first to plaintiffs' motions, the court is presented with a motion under Fed.R.Civ.P. 59(e) to alter or amend its judgment of September 8, 1986, regarding the statute of limitations applicable to the issues of initial assignments, supervisory promotion, and, to the extent they are successful on appeal in regard to it, the seniority system.[1] The plaintiffs would have the

1 Plaintiffs have not sought a Rule 59 amendment of judgment on the seniority system issue, but they do seek entry of a final judgment pursuant to

court abandon the law of the case and apply a six year statute of limitations via retroactive application of *Wilson v. Garcia* and adherence to *Miller v. Hall's Birmingham Wholesale Florist* and, tangentially, to *Jones v. Preuitt & Mauldin*.[2]

The Supreme Court in *Wilson* ruled that each state was to choose one statute of limitations as applicable to all Section 1983 actions arising in that state. The Court hopes to achieve uniformity, certainty, and minimization of unnecessary litigation by mandating the abandonment of case-by-case selection of statute of limitations in the civil rights arena. *Wilson v. Garcia*, 471 U.S. 261 (1985), *aff'g Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984). It must be noted that the very day it decided *Wilson* the Tenth Circuit declined to apply *Wilson* retroactively. The Tenth Circuit specifically ruled that *Wilson* be applied prospectively only. *Jackson v. Bloomfield*, 731 F.2d 652, 653-55 (10th Cir. 1984) (en banc).

The Eleventh Circuit and, subsequently, the district court in *Jones* applied Alabama's six year statute of limitations for trespass, Code of Alabama § 6-2-34(1), to actions brought under 42 U.S.C. § 1983. *Jones v. Preuitt & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *on remand*, 634 F.Supp. 1520 (N.D. Ala. 1986).

In July 1986, the district court in *Miller* applied this same six year statute to an action brought under 42 U.S.C. § 1981. The ruling in *Miller* has not undergone appellate review as of the date of this opinion, therefore, the Eleventh Circuit has not declared its opinion concerning the correctness of this position. *Miller v. Hall's Birmingham Wholesale Florist*, 640 F.Supp. 948 (N.D. Ala. 1986).

Rule 54(b) on all issues decided adversely to plaintiffs and plaintiff class. The court presumes that plaintiffs would seek the same broad period of liability to apply to all of their claims. The court finds it appropriate that final judgment be entered regarding its rulings concerning the seniority system, and that they be reviewed by the appellate court.

2 *Wilson v. Garcia*, 471 U.S. 261 (1985), *aff'g Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984). *Miller v. Hall's Birmingham Wholesale Florist*, 640 F.Supp. 948, (N.D. Ala. 1986). *Jones v. Preuitt & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *on remand*, 634 F.Supp. 1520 (N.D. Ala. 1986).

In the case at bar, the one year statute of limitations was incorporated into the class definition in the pretrial order. It was explicitly stated in *Pullman-Standard I* by this court. The Fifth Circuit repeated this limitation in both *Pullman-Standard II* and *Pullman-Standard VI* with no adverse comment.[3] All claims brought under 42 U.S.C. § 1981 which arose outside the one year period have been denied by this court's ruling. This time restriction was never the subject of appeal, and, thus, became the law of the case. Defendants have relied on this statute of limitations throughout this case's long history. Nothing plaintiffs have presented has persuaded this court that this reliance was unfounded, that retroactive application of *Wilson* and *Miller* is proper[4] or that there are valid grounds for diverging from the law of the case.[5]

The applicability of the six year statute of limitations to 42 U.S.C § 1981 actions in Alabama is still a debatable issue, particularly in cases which were litigated prior to *Wilson* and *Miller*.[6] The equities in the case at bar militate convincingly

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3 *Pullman-Standard I*, 11 FEP Cases 943, 948, n.20 (N.D. Ala. 1974); *Pullman-Standard II*, 539 F.2d 77, 85, n.17 (5th Cir. 1976); *Pullman-Standard VI*, 624 F.2d 525, 526 (5th Cir. 1980).

4 The Eleventh Circuit has applied *Wilson* retrospectively to a 42 U.S.C. § 1983 claim in *Williams v. City of Atlanta*, 794 F.2d 624, 627-28 (11th Cir. 1986). The appellate court clearly stated that it found this application proper because the plaintiffs had no precedent for waiting more than two years to file suit (the longest period which had been applied in Georgia for a Section 1983 claim for money damages). Plaintiffs had not relied upon any ruling of the court in their suit to the contrary nor upon any other precedent. The case at bar is clearly distinguishable by the defendants' long years of reliance on the one year statute of limitations.

5 *See Leggett v. Badger*, 798 F.2d 1387 (11th Cir. 1986); *Stanley v. United States*, 786 F.2d 1490, 1498 (11th Cir. 1986); *Dorsey v. Continental Casualty Company*, 730 F.2d 675, 678 (11th Cir. 1984); and 1B Moore's Fed. Prac. ¶ 0.404.

6 In the interest of achieving the uniformity, certainty, and minimization of unnecessary litigation sought by the Supreme Court through its opinion in *Wilson*, the Eleventh Circuit has stated that "[t]he same single limitations period should apply to § 1981 claims [as applies to § 1983 claims].

toward strict adherence to the law of the case doctrine on this issue. The parties have relied throughout the case's fifteen year life on the one year statute of limitations as dictated by Section 6-2-39(a)(5) of the Alabama Code.[7] This provision had been applied to Section 1981 actions by federal courts in Alabama before *Miller* was decided. *Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1263 (5th Cir. 1977); *Buckner v. Goodyear Tire & Rubber Company*, 476 F.2d 1287 (5th Cir. 1973); *aff'g* 339 F.Supp. 1108 (N.D. Ala. 1972).[8]

The Supreme Court has established a three-part analysis for considering retroactive application of judicial decisions. *Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971).[9] The final factor of weighing likely resultant inequities and hardships is the most persuasive in the instant case. After careful consideration of all facts, the court finds that substantial inequity, hardship, and

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Goodman v. Lukens Steel Company, 777 F.2d 113, 120 (3d Cir. 1985)." *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1503, n.2 (11th Cir. 1986). The court has no quarrel with this proposition, but it does not agree that the ruling in *Miller* should be retroactively applied in knee-jerk fashion.

7 This section was repealed in 1985, and replaced by Ala. Code § 6-2-38 which provides a two-year statute of limitations.

8 *See also Ray v. TVA*, 677 F.2d 818, 822 (11th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983) (A Veterans Preference Act case in which the court states that Alabama's one year statute of limitations is not so short as to frustrate federal policy); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1196 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976) (A Title VII backpay case which applied the one-year statute of limitations).

9 The court stated: (1) "[T]o be applied nonretroactively [the decision] must establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." (2) The history of the rule, its purposes, and whether retrospective application would further or retard its operation must be considered. (3) The inequity, hardship, and injustice that would result from retroactivity must be weighed.

It may certainly be argued that a decision in favor of nonretroactivity in this case could be premised on the first factor as well as on the third. This court, however, does not view *Wilson* as having overruled *Buckner*, nor does it view *Miller* in any way binding as precedent. The court, therefore, will not rely on this portion of the *Chevron* analysis.

injustice would result from retroactive application of *Wilson* and *Miller*. The plaintiffs' motion for alteration or amendment of judgment under Fed.R.Civ.P. 59(e), therefore, is DENIED.

The plaintiffs have further moved for entry of final judgment under Fed.R.Civ.P. 54(b) of all rulings decided adversely to them and to the plaintiff class. The court finds this request appropriate, except as to those rulings which relate to the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974. The court's denial of plaintiff's Rule 59 motion regarding the appropriate statute of limitations in no way impedes plaintiffs' right to appeal that issue. The plaintiffs' motion for entry of final judgment under Fed.R.Civ.P. 54(b) is GRANTED, subject to the aforementioned exception.

Defendant, *Pullman-Standard*, has made motions to alter or amend the judgment under Fed.R.Civ.P. 52(b) and 59(e). The company contends that there has never been a finding of intentional discrimination in its selection of supervisory personnel. The Fifth Circuit specifically found that the company had failed to rebut plaintiffs' prima facie case regarding racially discriminatory selection of supervisory personnel. *Pullman-Standard VI*, 624 F.2d 525, 536 (5th Cir. 1980). This issue was not a subject of the Supreme Court appeal, and, thus, became the law of the case. *Stanley v. United States*, 786 F.2d 1490 (11th Cir. 1986); *Dorsey v. Continental Casualty Co.*, 730 F.2d 675 (11th Cir. 1986). The court finds that this holding is ripe for Phase II proceedings, and that the plaintiffs will not be required to prove intentional discrimination by the company at that point. Defendant Company's motions under Fed.R.Civ.P. 52(b) and 59(e) are DENIED.

Defendant company has moved in the alternative for leave to appeal this issue under 28 U.S.C § 1292(b). Defendant has further moved for leave to appeal under that section the issue of whether named plaintiffs have standing to represent class members claiming discriminatory initial job assignments. The court finds that there are controlling questions of law as to which there is substantial ground for difference of opinion regarding: (1) its holding that there has been a finding of intentional discrimination in the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974, and that defen-

dant company is subject to potential liability at a Phase II hearing with respect to such claims, and (2) the issue of whether named plaintiffs have standing to represent class members claiming discriminatory initial job assignments. The court further finds that immediate appeal of these issues may materially advance the ultimate termination of this litigation, and recommends that the court of appeals permit said appeal. Motion for leave to appeal these issues is GRANTED.

An order in conformity with this opinion will be entered contemporaneously herewith.

This the 25th day of November 1986.

/s/ SAM C. POINTER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

No. CV 71-P-0955-S

Filed November 26, 1986
Entered November 26, 1986

LOUIS SWINT, et al.,

Plaintiffs,

—vs.—

PULLMAN-STANDARD, et al.,

Defendants.

ORDER

In accordance with the Opinion filed concurrently herewith, this court's opinion entered September 8, 1986, is hereby AMENDED in the manner described herein. The final sentence of the paragraph beginning on page eleven and ending on page twelve is to read:

In the case at bar, extrinsic nonquantitative evidence concerning the selection process has been considered in conjunction with the statistical evidence from both sides.

In all other respects, the court's order and opinion entered September 8, 1986, are hereby RATIFIED and REAFFIRMED in their entirety.

It is FURTHER ORDERED:

1. Plaintiffs' Motion to Alter or Amend Judgment pursuant to FRCP 59(e) is hereby DENIED.

2. Defendant, Pullman-Standard's, Motion to Alter or Amend the Judgment pursuant to FRCP 52(b) and 59(e) is hereby DENIED.

3. The court finds that there is no just reason for delaying entry of final judgment on the claims decided adversely to plaintiffs and the plaintiff class in the court's decision of September 8, 1986, being all claims except those relating to the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974. The plaintiffs' motion for entry of final judgment on these issues pursuant to FRCP 54(b) is hereby GRANTED. It is further ORDERED that final judgment be ENTERED denying all claims of the plaintiffs and the plaintiff class except those relating to selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974.

4. The court finds there to be a controlling question of law as to which there is substantial ground for difference of opinion regarding this court's holding that there has been a finding of intentional discrimination in the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974, and that the defendant company is subject to potential liability at a Phase II hearing with respect to such claims. The court further finds that immediate appeal of this issue may materially advance the ultimate termination of this litigation. Therefore, the defendant's motion for leave to appeal under 28 U.S.C. § 1292 is hereby GRANTED

with the recommendation of this court that the Court of Appeals permit said appeal.

5. The court is of the opinion that there is substantial ground for difference of opinion regarding the named plaintiffs' standing to represent class members claiming discriminatory initial job assignments during the period from July 17, 1969, to August 16, 1974. The court further finds that immediate appeal of this issue may materially advance the ultimate termination of this litigation. Thus, leave to appeal this issue of standing is hereby GRANTED pursuant to 28 U.S.C. § 1292 with the recommendation of this court that the Court of Appeals permit said appeal.

This the 25th day of November 1986.

/s/ SAM C. POINTER, JR.
United States District Judge

III. The Judgment Sought to be Reviewed and Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7319

D.C. Docket No. 75-2266

WILLIAM B. LARKIN; LOUISE SEALS, as personal representative of SPURGEON SEALS, deceased; LILLIE LOFTON, as personal representative of EDWARD LOFTON, deceased; JESSE B. TERRY, on behalf of himself and others similarly situated,

Plaintiffs-Appellants,

versus

PULLMAN-STANDARD DIVISION, PULLMAN, INC., a corporation,

Defendant-Appellee.

No. 86-7886

D.C. Docket No. 71-0955

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated; CLYDE HUMPHREY,

Plaintiffs-Appellants,

versus

PULLMAN-STANDARD, Bessemer, Alabama; UNITED STEELWORKERS OF AMERICA LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO INTERNATIONAL ASSOCIATION OF MACHINISTS,

Defendants-Appellees.

No. 87-7057

D.C. Docket No. 71-0955

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated, CLYDE HUMPHREY,

Plaintiffs-Appellees,

versus

PULLMAN-STANDARD, Bessemer, Alabama,

Defendant-Appellant,

UNITED STEELWORKERS OF AMERICA LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS,

Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

Before:

JOHNSON and CLARK, *Circuit Judges*, and DUMBAULD*, *Senior District Judge*.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court on appeal in Nos. 84-7319 and 87-7057 be and the

* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

same is hereby AFFIRMED; and the judgment of the District Court on appeal in No. 86-7886 be and the same is hereby AFFIRMED in part and REVERSED in part; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 21, 1988

For the Court: Miguel J. Cortez, Clerk

By: /s/ KARLEEN MCNABB
Deputy Clerk

ISSUED AS MANDATE: January 11, 1989

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7319

WILLIAM B. LARKIN; LOUISE SEALS, as personal representative of SPURGEON SEALS, deceased; LILLIE LOFTON, as personal representative of EDWARD LOFTON, deceased; JESSE B. TERRY, on behalf of himself and others similarly situated,

Plaintiffs-Appellants,

versus

PULLMAN-STANDARD DIVISION, INC., a corporation,

Defendant-Appellee.

No. 86-7886

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated; CLYDE HUMPHREY,

Plaintiffs-Appellants,

versus

PULLMAN-STANDARD, Bessemer, Alabama; UNITED STEELWORKERS OF AMERICA LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS,

Defendants-Appellees.

No. 87-7057

LOUIS SWINT, and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated; CLYDE HUMPHREY,

Plaintiffs-Appellees,

versus

PULLMAN-STANDARD, Bessemer, Alabama,

Defendant-Appellant,

UNITED STEELWORKERS OF AMERICA LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion September 21, 1988, 11 Cir., 198__, __ F.2d __).
(January 3, 1989)

B e f o r e

JOHNSON and CLARK, *Circuit Judges*, and
DUMBAULD*, *Senior District Judge*.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

---

* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

IV. Other Appended Materials

a. Applicable Constitutional Provisions and Statutes

United States Constitution

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Title VII of Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for

employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, col-

lege, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchap-

ter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community. State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 1981

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
R.S. § 1977.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Federal Rules of Civil Procedure

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

b. Selected Record Extracts

* * *

1974 Transcript, page 884, lines 7-15:

Q (BY MR. CLEMON) Mr. Johnson, will you state to the Court your full name?

A Willie James Johnson.

Q And where do you live?

A 2801 Dexter Avenue, Bessemer.

Q Mr. Johnson, where are you now employed?

A Pullman-Standard.

Q When did you first go to work for Pullman?

A January 12th, '56.

* * *

1974 Transcript, page 899, lines 5-23:

Q (BY MR. CLEMON) Mr. Johnston, was there a time when you were a foreman that—in the paint department?

A (BY MR. WILLIE JAMES JOHNSON) Yes.

Q Was this a temporary or salaried position?

A Temporary.

Q Are there any black foremen in the paint department at this time?

A Yes, there are.

Q How many?

A Two.

Q What are their names?

A Willie Carter and Fred Prince.

Q Now, when were you a temporary foreman in the paint department?

A 1965.

Q 1965?

A Yes.

Q How long were you a temporary foreman?

A Approximately six weeks.

* * *

1974 Transcript, page 938, lines 2-11:

Q (BY MR. CLEMON) Mr. Stubbs came to you about two or three months ago, didn't he, Mr. Johnson, and asked you

if you wanted to be—offered you a position as temporary foreman?

A (BY MR. JOHNSON) Right.

Q And you told him you weren't interested?

A No, I told him I wouldn't take it at least at that time, because I was feeling—was suffering ulcers and I thought the job would be too much for my stomach; I was having a little trouble out of it.

* * *

1974 Transcript, page 1054, lines 13-15:

Q (BY MR. CLEMON) Now, Mr. Swint, when did you go to work for Pullman?

A (BY MR. SWINT) In November, 1964.

* * *

1974 Transcript, pages 1775 line 1 to 1776 line 19:

A (BY MR. HARRY E. DEBROW, SR.) Well, in July of 1968, on the 31st of July, I were informed by Mr. Smitherman that I would be starting out the 1st day of August again on salary.

Q (BY MR. STELZENMULLER) Did he ask you if you would take it or just tell you you were going to get it whether you liked it or not?

A He just told me I would be going back. Wasn't any discussion one way or the other.

Q And you did go back?

A I did go back.

Q Did you have conversations about the subject with Mr. Swint along about that time?

A Subject with Mr. Swint?

Q Yes.

A What about?

Q About going on as foreman.

A No, sir, I didn't.

Q Did you know Mr. Swint then?

A No, sir, I didn't.

Q On an occasion did you discuss a gold helmet, foreman's gold helmet with Mr. Swint?

A No, not on that day.

Q Well, on some other occasion?

A That was some other occasion.

Q Would you tell us when it was and what that discussion was?

A As I recall, a man came along where I were working. I were working back in the bargaining unit back at that time. And he says to me, Harry, you know what I would do if I were you? He says, I would let the company keep their gold hat.

Q Was that Swint?

A I later after I learned who he was, I didn't know who he was at that time, just someone walked up to me. I didn't know him.

Q You later learned it was Swint?

A I later learned that the man's name was Swint. I didn't know who he was then.

Q Did you have anything to say to him about the subject of going back on salary?

A The only words I recall him saying, well, I had not thought about it like that.

* * *

1974 Transcript, pages 2505 line 12 to 2507 line 5:

Q (BY MR. STELZENMULLER) How did Swint get along with his fellow employees, do you know?

A (BY MR. RODRIQUEZ) You mean as far as his work went?

Q Yes. Work and work habits, getting along with folks.

A Well, the best I can answer that is the men complained about having to work behind him, you know, the OK men and all, they grumbled about it all the time. As far as personal relations with the men, I can't answer that.

Q How about, you know Mr. Harry Debrow over here, don't you?

A Yes, sir.

Q Did you have any conversation with Mr. Swint concerning him?

A Yes, I did.

Q Tell us about it, when was it, best you remember and what it was.

A I don't remember exactly when it was. But he complained to me one time about that he thought somebody was mistreating him as far as him being a black man.

And I told him, I said, why don't you go down there and talk to Mr. Clyde Robinson and Mr. Harry Debrow.

And he stated to me that he didn't have anything to say to that damn Uncle Tom or something to that effect.

I don't remember the exact words, but he called him an Uncle Tom, I know that.

Q Said he didn't have or didn't want to have anything to do with him?

A He said, let's see, best I recall, he said he wasn't nothing but a damn Uncle Tom or something like that.

Q Have you heard Mr. Swint refer to anybody—any other supervisor or union official or that type of language?

A Yes. I heard him refer to his union officials as Uncle Toms.

* * *

1974 Transcript, pages 2550 line 5 to 2553 line 19:

Q (BY MR. STELZENMULLER) Were you a supervisor at that time?

A (BY MR. ALFRED MOORER) I was.

Q Were you an hourly supervisor then?

A Salary.

Q Do you recall a conversation you had shortly after Mr. Thompson was elected president with Mr. Swint referring to that, to his election, to the election and what was going to happen and so on?

A Yes. I remember a conversation.

Q Where did it happen and when, best of your recollection?

A It happened at one of the employees, one of the other employee's house.

Q Were there a number of people over there?

A Yes.

Q Was it just an informal gathering or how did you happen to be over there?

A Well, just an informal gathering.

Q Were there a number of employees besides yourself over there?

A Well, yes. Everybody there was employed by Pullman.

Q And you—were you the only person who was a supervisor in the crowd?

A Right.

Q Now, what was the conversation you had with Mr. Swint then?

A Well, it wasn't much of a conversation. Mr. Swint just said he and the Tiger were going to take care of the Uncle Toms out there.

Q Me and the Tiger are going to take care of the Uncle Toms?

A Yes.

Q How did he say that? Did he say that directly to you or just to the crowd?

A I believe he was speaking directly to me.

Q Was he standing close to you looking at you when he said that?

A We were sitting.

Q Beg your pardon?

A We were sitting down when he said it.

Q You were sitting down but he looked at you and said, me and Tiger are going to take care of the Uncle Toms out there?

A Yes.

Q You took that as a reference to you, among other people?

MR. CLEMON: Your Honor, we object to whatever mental operation may have gone on in his mind.

THE COURT: I overrule.

A Yes.

Q Tell me what you said about it, Mr. Morrow, if anything.

A I told Mr. Swint the best place to take care of me would be out there where we were.

Q In other words, you were telling him if he was threatening to take care of it now?

A Well, if he felt that way.

Q If he felt that way?

A Yes.

Q Anything happen after that?

A No.

Q Let me ask you, Mr. Moorer, if you didn't get pretty mad about that?

MR. CLEMON: Your Honor, we object to whether he got mad or not.

THE COURT: I am going to overrule. It seems to me that the motivation on the part of those who may be involved in Mr. Swint's discharge is of some significance in ascertaining ultimately the reason for his discharge and if there was hostility between this witness and Mr. Swint, for whatever the cause, it has some bearing perhaps on the offer.

MR. CLEMON: Yes, sir.

THE COURT: I overrule.

Q Pretty worked up about it, Mr. Moorer?

A Well, it didn't bother me too much. I felt like the best place to settle it would be outside of the plant.

Q Was anything else said between you and Swint at that time?

Q No.

* * *

1974 Transcript, pages 3206 line 22 to 3208 line 2:

A (BY MR. PRINCE) Well, I was told if I was the foreman, I was also a union member and a man that didn't do his work, I was not supposed to write a message or tell the foreman. I was supposed to pull my hat off, give the job

up. I was told that by the president and Dixon, whatever it is.

Q (BY MR. STELZENMULLER) Are you referring to the president?

A I was not supposed to discipline that man or tell anything on him because I was a union man, I was supposed to give my job up.

Q Mr. Swint, you say, said that?

A He did so.

Q And Mr. Blimp?

A Whatever his name is. He went to try to explain to me about some fellow in the wood mill who had did this thing. I don't know who he was talking about.

Q Had given his hat up?

A That is the best I can understand it. He was trying to explain it to me about it. I don't know who it was.

Q What does it mean when you say give your hat up?

A Well, if a man don't do his job, you don't say anything to him, you just quit being a foreman.

Q You quit being a foreman?

A You quit being a foreman.

* * *

Supreme Court, U.S.
FILED
OCT 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PULLMAN-STANDARD, INC., etc.,

Petitioner,

v.

LOUIS SWINT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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No. 88-1601

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

PULLMAN-STANDARD, INC., etc.,

Petitioner,

v.

LOUIS SWINT, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Louis Swint, et al., respectfully request that this Court deny the petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Discrimination in the Selection of Supervisors

(1) Petitioner asserts that the court of appeals erred in finding that the employer's method of selecting foremen had an unlawful disparate impact in violation of Title VII. (Pet. 14-20) The threshold difficulty with this contention is that for procedural, arguably jurisdictional reasons, it cannot be raised on appeal at this point in the litigation.

The Eleventh Circuit held that these promotion practices violated Title VII, but it did so not in its recent 1988 opinion, but in its earlier 1980 opinion. (Pet. App. 222a-227a). Petitioner could have sought review of that decision nine years ago, and it did, but in vain. Petitioner's 1980 certiorari petition expressly asked this Court to reconsider this aspect of the 1980 Eleventh Circuit

decision,[1] but the Court limited its grant of certiorari to questions related to the disputed seniority system. Pullman-Standard v. Swint, 451 U.S. 906 (1981) (Pet. App. 232a).

Although the Eleventh Circuit's 1988 opinion also addressed one aspect of this issue, it did so subject to a constraint equally applicable to this Court. The foreman promotion issue was before the court of appeals in 1988 only because, and to the extent that, a single subsidiary question had been certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The question so certified was whether

> there has been a finding of intentional discrimination in the selection of supervisory

---

[1] The third and fourth questions in that petition dealt with the selection of supervisors. Petition for Writ of Certiorari, No. 80-1190, pp. ii-iii; 27-30.

> personnel ... and ... the defendant is subject to potential liability at a Phase II hearing with respect to such claims.

(Pet. App. 284a) (emphasis added) (See also id. at 282a-283a).[2] Petitioner's central contention in the 1988 appeal was that the 1980 opinion fell short of the finding of intentional discrimination that, petitioner contended, was necessary to warrant proceeding to a Phase II hearing regarding the amount of petitioner's liability. The Eleventh Circuit dismissed this argument as irrelevant, explaining that its 1980 decision had rested on a finding of unlawful discriminatory impact, not

---

[2] The district court order to which this question apparently referred had ruled that the 1980 circuit opinion constituted a sufficient finding of intentional discrimination. (Pet. App. 282a).

unlawful discriminatory intent.[3] Under section 1292(b) the only issue regarding supervisors over which the Eleventh Circuit had jurisdiction in the 1988 certified appeal was whether the 1980 opinion lacked an allegedly essential finding of discriminatory intent; petitioner does not here contest that aspect of the 1988 opinion, and does not ask this Court to review it.

The 1988 opinion does go on to explain the holding of the 1980 decision,

---

[3] Pet. App. 51a-52a:

> "[I]n the company's view, the Swint VI holding does not constitute the required finding of intentional discrimination.... It is true ... that Swint [VI] does not include a finding that Pullman intentionally discriminated in its selection of supervisors. That observation, however, is irrelevant: the plaintiffs here clearly proceeded on a disparate impact, rather than disparate treatment, theory, and thus did not need to prove discriminatory intent."

and to note the different standard of proof in a disparate impact case and a disparate treatment case. But this commentary does not and could not present a distinct issue, outside the scope of section 1292(b), that could be reviewed by this Court. This Court reviews holdings, not reasons, and the dispositive holding in the certified appeal was that the 1980 opinion did not lack an essential finding of discriminatory intent, a holding with which petitioner does not now disagree.

We do not suggest that petitioner is forever precluded from bringing to this Court the issues raised in its petition, but only that it cannot do so at this interlocutory point in the litigation. Once a final judgment has been entered on the foreman issue, petitioner could seek review by this Court and ask it to reach back and correct any legal error

underlying that judgment. Mercer v. Theriot, 377 U.S. 152, 153-54 (1964). This Court could do so despite having denied certiorari in 1980. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n. 1 (1973). But at this point in the litigation it would be inconsistent with the constraints of section 1292(b), and with the policy against interlocutory appeals, to convert an appeal of a narrowly drawn certified question into a plenary interlocutory review of any and all aspects of the claim.[4]

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[4] For the same reason petitioner cannot at this point in time seek review of its objection that certain aspects of the Eleventh Circuit's 1980 opinion, which this Court previously declined to review, constituted improper appellate factfinding. (Pet. 26-28). Petitioner objects that in 1988 the Eleventh Circuit improperly "refused to reconsider" its 1980 decision. (Pet. 26). In light of the limited scope of the section 1292(b) certified question, that refusal was for procedural reasons entirely proper.

(2) Petitioner suggests that the 1980 and 1988 Eleventh Circuit opinions failed to anticipate the changes in the law brought about by Watson v. Fort Worth Bank & Trust Co., 101 L.Ed.2d 827 (1988), and, presumably, Wards Cove Packing Co. v. Atonio, 104 L.Ed.2d 733 (1989). There is dictum in the 1988 opinion placing on an employer in a disparate impact case not only the burden of production, but also the burden of proof regarding the business justification for practices with a disparate impact. (Pet. 18-20). (See Pet. App. 53a). But in this case the actual 1980 finding of a Title VII violation was, in the view of the 1988 appellate panel, premised on a holding that petitioner had failed to meet its burden of production. The court of appeals in its 1988 opinion explained that the 1980 opinion was grounded on a

determination that "Pullman had offered no legally acceptable evidence that its subjective selection procedure was a business necessity." (Pet. App. 53a).

Petitioner asserts that the Eleventh Circuit held "in effect" that a plaintiff could establish a prima facie case of disparate impact without having to compare an employer's selection rate with the composition of the pool of qualified individuals. (Pet. 14-17). The Eleventh Circuit's 1988 opinion, however, expressly emphasized the existence of just such a requirement:

> We recognize fully that Johnson [v. Transportation Agency, 480 U.S. 616 (1987)] and Hazelwood [School District v. United States, 433 U.S. 299 (1977)] require plaintiffs to recognize the basic qualifications for a position and exclude from their statistical pools persons who are obviously unqualified.

(Pet. App. 56a n. 50). Petitioner suggests that the appellate court, in

finding a prima facie case of disparate impact, improperly overrode the determinations of the district court (Pet. 15); in fact, the district court too found such a prima facie case. (Pet. App. 171a, 222a).

Disputes regarding whether evidence of disparate impact is sufficiently refined raise essentially fact-specific questions about the practices and business needs of an individual employer.[5] In this case that factual assessment has proved particularly difficult. As the Court of Appeals observed in 1980, there was a "lack of any articulated or defined skills which are necessary to perform capably as a temporary or salaried foreman at

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[5] Dothard v. Rawlinson, 433 U.S. 321, 330-31 (1977). ("If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.")

Pullman-Standard." (Pet. App. 226a). The appellate court noted in its 1976 opinion that there were "no established criteria for selection of new foremen." (Pet. App. 136a).

The factual problems involved in evaluating this record are illustrated by the somewhat different manner in which petitioner has characterized its own practices. In its pending petition the company maintains that "experience in the particular or related department was normally required" for promotion to a foreman position. (Pet. 15). (Emphasis added). But in its 1980 certiorari petition the company adamantly insisted that there was no such requirement:

> Pullman clearly imposed no requirement that a foreman be promoted from within the same department.... [T]he Fifth Circuit apparently misunderstood it did.... [and] then held that Pullman discriminated against blacks in promotions to foremen ... because the

> imaginary requirement that supervisors be promoted from within the same department was not a "business necessity."[6]

It would not be appropriate to grant certiorari to resolve the fact-specific conflict between the company's two certiorari petitions.

II. Scope of the Class

The issue framed by petitioner regarding the scope of the class also appears to be unreviewable at this interlocutory point in the litigation, although it could be raised at a later date. The authority of the appellate courts to address this question is circumscribed by the scope of the specific

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[6] Petition for Writ of Certiorari, No. 80-1190, pp. 28-29 (emphasis added). See also id. at 9 ("The evidence and the District Court's own findings showed that Pullman did not restrict promotions to temporary foreman to intradepartmental ones"), id. ("undisputed evidence shows [that experience in the same department] was never a requisite to such promotions").

question certified under section 1291(b). That question was whether

> the named plaintiffs [have] standing to represent class members claiming discriminatory initial job assignments during the period from July 17, 1969 to August 16, 1974.

(Pet. App. 285a) (Emphasis added).[7] The question so certified is now clearly moot. The district court held that assignment discrimination ended by January 31, 1969, and the Eleventh Circuit upheld that finding. (Pet. App. 41a) The only assignment discrimination claims still

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[7] Although section 1292(b) provides for certification of an order for an interlocutory appeal, the district court's certification in this regard makes no reference to the issue having been resolved by any prior district court order, but simply certifies the quoted question. In requesting leave to appeal by the Eleventh Circuit, petitioner attributed to the prior court of appeals decision, not to the district court, the decision to sustain this aspect of the class. Petition of Pullman-Standard for Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), No. 86-2143 (11th Cir), pp. 27-31.

being litigated in this case involve assignments occurring prior to February 1, 1969.

Petitioner contends that the class represented by the named plaintiff cannot include employees who were subject to "post-Act discrimination in ... assignments." (Pet. 23), i.e. employees subjected to that discrimination after July 1, 1965. But the period from July 1965 through January 1969, the era of the proven actionable assignment discrimination in this case, is outside the scope of the certified section 1292(b) question. Similarly, petitioner argues that the named plaintiffs cannot litigate class claims of discrimination in the selection of supervisors; but that too is clearly outside the scope of the certified question. Again, as we noted above, there are issues which petitioner can raise

after final judgment. In both General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 153 (1982), and East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 400 (1977), the appeal regarding the scope of the plaintiff class was entertained only after the entry of final judgment on the merits of those claims. "[O]rders granting class certification are inherently interlocutory," Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978), and are "subject to effective review after final judgment." Id., 437 U.S. at 469.

The decision of the appellate court approving the scope of the class in this case reflected not an unthinking "'across-the-board' approach to Title VII class actions" (Pet. 21), but a carefully reasoned analysis of the claims of the named plaintiffs and the putative class

members. The Eleventh Circuit correctly noted that

> [f]rom the start, the plaintiffs' basic complaint has been that Pullman prevented black employees from moving into its higher-level positions through a combination of discriminatory initial assignments and a departmental seniority system. At the time of certification, this claim was legally identical to that of every other member of the class.

(Pet. App. 39a-40a). There were from the outset of this litigation two questions of fact common to the named plaintiffs and all of the putative class members: (1) Did the company engage in a pattern and practice of assigning newly hired black workers to less desirable departments? and (2) Was the effect of such discrimination in assignments unlawfully perpetuated by the plant seniority system? See Teamsters v. United States, 431 U.S. 324, 343-56

(1977).[8] The named plaintiffs could not prevail without demonstrating that they had been given initial assignments on the basis of race; they undertook to do so, as is normal in a race discrimination case, by attempting to show that the company engaged in a longstanding general practice of discrimination in assignments.

This case was initially certified in 1974, without objection, to include a class of all black workers employed at the plant since 1965.[9] (Pet. App. 9a) The district court initially held that there had been relatively little assignment

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[8] The district court noted in 1974 that the class issues included, "Does the system of departmental seniority ... perpetuate the effects of past discrimination in the assignment of black employees among the various departments?" (Pet. App. 66a).

[9] The class action encompassed all claims arising within one year of the earliest Title VII charge. (Pet. App. 20a). The earliest such charge was filed in 1966.

discrimination even prior to 1965. (Pet. App. 74a). The Fifth Circuit in 1976 vacated that holding and remanded the issue for further proceedings. (Pet. App. 128a). On remand in 1977 the district court found that at least until 1965 there had indeed been a general policy of discrimination in assignment. (Pet. App. 160a-161a). Thereafter litigation continued regarding when that discriminatory practice ended, and regarding whether the effects of that discrimination were unlawfully perpetuated by the seniority system.[10]

At the point in time when this case was filed, and the class was certified, respondents' claim that petitioner engaged in a general practice of assignment

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[10] The validity of the seniority system is the subject of our own petition. Swint v. Pullman-Standard Co., No. 88-1602.

discrimination, and perpetuated the effects of that discrimination through its seniority system, presented a paradigm of the type of claim for which a Rule 23(b)(2) class action is appropriate.[11] If the individual claims of the named plaintiffs had thereafter failed, that would not have precluded them from continuing to represent the certified class. Franks v. Bowman Transportation Co., 424 U.S. 747, 753-57 (1976). A fortiori respondents are not precluded from continuing to represent the class simply because they have now succeeded in showing that they were the victims of assignment discrimination.

Petitioner objects that the named plaintiffs do not have "a personal stake"

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11 Class certification is appropriate if, inter alia "[t]he party opposing the class has acted ... on grounds generally applicable to the class." F.R.Civ. Pro., Rule 23(b)(2).

in whether there was assignment discrimination after 1965. (Pet. 21). But this is an attack, not on the decision of the Eleventh Circuit, but on Rule 23 itself. A class representative virtually never has a "personal stake" in whether individual class members personally collect a money judgment or receive the benefits of an injunctive decree. As this Court explained in Franks, even after the claims of a class representative have been resolved and he or she no longer has any "personal stake in the outcome" of the litigation, class certification confers on the named plaintiffs authority to continue to represent the interests of the class members whose claims remain in dispute. Franks v. Bowman Transportation Co., 424 U.S. at 752-57.

III. The Statute of Limitations

Petitioner argues that the statute of limitations for a section 1981 claim arising in Alabama should be one year (Pet. 28-29), rather than the six year period adopted by the court below. (Pet App. 29a-35a). Petitioner does not contend that the claims in this case are time barred, but seeks only to shorten the period for which it faces back pay liability. The practical significance of this issue is in the instant case somewhat limited. The Court of Appeals held that the limitations period for respondents' Title VII claims, which encompass all the claims also asserted under section 1981, commenced on September 28, 1966, (Pet. App. 19a-28a), a holding which petitioner does not challenge. Utilization of a six year limitation period for the section 1981 claim in fact extends the total

period of back pay liability less than a year, since most of that six year period overlaps the years when back pay would in any event be available under Title VII.

Petitioner urges that Owens v. Okure, 109 S.Ct. 573 (1989), indicates that the one-year Alabama residual statute of limitations, rather than a six year limitations period, should now be applied in section 1981 actions arising in that state. That contention, even if correct, would not control the rule of limitations to be applied in this case.

Rule 8(c), F.R.Civ. Pro., requires a defendant to "set forth affirmatively" in its answer any "statute of limitations" defense. In its original 1971 answer, petitioner stated:

> This defendant avers that the applicable statutes of limitations, Alabama Code, Title 7, Sections 21 and 22, bar all claims made in the complaint, based on 42 U.S.C.A., Section 1981, arising more than six

> years prior to the filing of the complaint.

(Pet. App. 35a n. 35) (Emphasis added). Petitioner never sought to amend its answer, and did not assert the existence of any shorter limitations period until this litigation had been pending for over a decade.[12] The Eleventh Circuit properly recognized that such conduct, at least ordinarily, constitutes "a waiver of the shorter statute." (Pet. App. 35a).[13]

Even if it were not now too late for petitioner to disavow its longstanding

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[12] The Court of Appeals noted that "[t]here is a strategic reason why a class action defendant might waive objections to the size or inclusiveness of a class: a favorable decision against an all-inclusive class of plaintiffs will in many instances bar further suits." (Pet. App. 21a n. 26).

[13] All circuit courts agree that a failure to plead a statute of limitations waives that affirmative defense under Rule 8. 5 Wright & Miller, Federal Practice and Procedure, § 1278; 2A Moore's Federal Practice, ¶ 8.27[4].

position that section 1981 claims are subject to a six year period of limitations, the major issues raised by Owens in this case would concern retroactivity. During the 18 years since this case was filed the law regarding the section 1981 period of limitations has reversed field several times. At the time this case was first filed, the (then) Fifth Circuit law was that the period of limitations for a section 1981 claim was ten years, and that that limitations period itself was tolled by the filing of a Title VII charge.[14] The district judge in this case applied that tolling rule in his 1974 order specifying the period during which back pay claims on behalf of the class were at issue.[15] In 1975

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[14] Boudreaux v. Baton Rouge Marine Contr. Co., 437 F.2d 1011, 1017 n. 16 (5th Cir. 1971).

[15] Pet. App. 20a.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), overturned the circuit court's tolling rule. For a time the Fifth Circuit then held that section 1981 claims should be governed by the Alabama limitations period for contract actions; that line of decisions was overturned by Wilson v. Garcia, 471 U.S. 261 (1985) (§ 1983) and Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (§ 1981). The Eleventh Circuit thereafter construed Wilson to require the use of the six year Alabama rule for trespass to person or liberty. Jones v. Preuit & Mauldin, 763 F.2d 1250, 1256 (11th Cir. 1985). Now, petitioner maintains, Jones has in turn been overruled by Owens. Which of this succession of supervening decisions should and should not be applied retroactively to the unique and complex circumstances of this litigation is a fact specific

question peculiar to this case. It is not a question which warrants review by this Court or which, after 18 years of litigation, respondents should be required to litigate yet again.

CONCLUSION

This case, possibly more than any employment discrimination suit of our era, has been buffeted and prolonged by seemingly incessant changes in the law. This case has been tried 4 times, and has to date given rise to 11 opinions. The foreman selection issue was originally tried 15 years ago, and the finding of liability was made 9 years ago. The district court first found 15 years ago that there had been a practice of pre- and post-Act assignment discrimination. (Pet. App. 77a). To date not a single penny of back pay has been ordered to implement those liability determinations, and Stage

II proceedings to calculate the back pay awards have not even begun. After 18 years of litigation, many of the original class members have died. (Pet. App. 3a). It would be unconscionable to now require that this entire process begin anew.[16]

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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16 See Franks v. Bowman Transportation Co., 424 U.S. at 757 n. 9 ("to 'split up' the underlying case and require that the individual class members begin anew ... would be destructive of the ends of judicial economy as well as postpone indefinitely relief which under the law may already be long overdue.")

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IN THE

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OCTOBER TERM, 1989

PULLMAN-STANDARD,

Petitioner,

—v.—

LOUIS SWINT, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER

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Respondents.

REPLY BRIEF OF PETITIONER

ARGUMENT

Respondents' opposing brief simply does not take issue with the central propositions of the petition: (1) that the Eleventh Circuit below imposed liability on petitioner in a manner flatly at odds with this Court's requirements for a prima facie disparate impact case and this Court's articulation of the defense burden, as initially set forth in the plurality opinion in *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988) and subsequently adopted by the majority in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989); (2) that the Court of Appeals violated the strictures of *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), and Article III of the Constitution in permitting plaintiffs who were hired outside of the liability period and who never asserted individual claims of discriminatory denial of supervisory positions to serve as representatives of a class asserting such claims; (3) that the Court of Appeals ignored this

Court's directive in *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273 (1982), by reaffirming the *de novo* appellate fact-finding that pervaded that court's prior ruling; and (4) that the Eleventh Circuit applied a statute of limitations to respondents' 42 U.S.C. § 1981 (1982) claim that cannot stand in light of *Owens* v. *Okure*, 109 S. Ct. 573 (1989).

Conceding that these issues may be appropriately considered by this Court at some later point—presumably after years of backpay hearings for the thousand or more members of the class—respondents oppose the petition principally on the ground that a jurisdictional bar of sorts prevents review at this time. And where this supposed jurisdictional hurdle does not suffice, respondents attempt to dismiss the import of the ruling below by suggesting that critical conclusions of the Court of Appeals incontestably at variance with *Wards Cove* are "dictum" (Brief in Oppos., p. 8) or involve "essentially fact-specific questions" (*id.* at 10); that petitioner's objections to class representative standing of the named plaintiffs are "now clearly moot" (*id.* at 13) and constitute an attack "on Rule 23 itself" (*id.* at 20); and that petitioner's *Owens* v. *Okure* contention either has been waived or is in any event of "somewhat limited" practical significance (*id.* at 21).

We respectfully submit that none of respondents' arguments has the slightest merit, and that the petition—as respondents' silence on the merits more than suggests—raises substantial questions concerning the appropriate ground rules for employment discrimination class actions in the post-*Watson* era. Should this Court deem it appropriate, however, to await further developments in light of its rulings last Term in *Wards Cove*, *Owens* v. *Okure*, and *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989), we would urge that the judgment of the Court of Appeals be vacated and the case remanded to the Court of Appeals, directing that court to reconsider its decision in light of this Court's recent pronouncements—ones that respondents tellingly dismiss as "seemingly incessant changes in the law" (Brief in Oppos., p. 26).

1. The absence of supporting authority for respondents' jurisdictional contention speaks for itself. The cases are legion to the effect that 28 U.S.C. § 1292(b) (Supp. V 1987) "authorizes certification of *orders* for interlocutory appeal, not certification of *questions*." *Isra Fruit Ltd.* v. *Agrexco Agricultural Export Co.*, 804 F.2d 24, 25 (2d Cir. 1986) (emphasis in original). As Judge Easterbrook recently observed in *Edwardsville National Bank and Trust Co.* v. *Marion Laboratories, Inc.*, 808 F.2d 648, 650 (7th Cir. 1987): "The statute refers to certifying an 'order' for interlocutory appeal. It is not a method of certifying questions. The question is the *reason* for the interlocutory appeal but the thing under review is the order." (Emphasis in original)[1]

Here, the orders of the District Court appealed from reaffirmed the finding of liability with respect to the claim of discrimination in supervisory selections and set the case for so-called "Phase II" backpay hearings, *see Swint* v. *Pullman-Standard* (*Swint IX*), No. CV 71-P-0955-S, slip op. at 7-8 (N.D. Ala. Sept. 8, 1986) (App. 269a); and, while reaffirming the finding of liability with respect to the initial assignment claim, entered judgment for petitioner in accordance with that court's ruling as to the date commencing the liability period, *see id.* at 11-14 (App. 273a-276a). The trial court then granted respondents' motion for entry of a final judgment under Fed. R. Civ. P. 54(b) on all claims other than the supervisor selection claim, and certified an appeal of its order adverse to petitioner on the latter claim. *See Swint* v. *Pullman-Standard* (*Swint X*), No. CV 71-P-0955-S, slip op. at 1-2 (N.D. Ala. Nov. 26, 1986) (App. 284a-285a). Accordingly, the Court of Appeals had authority "to consider 'all grounds advanced in support of the [orders reaffirming Pullman's liability and entering final judgment against respondents] and all grounds suggested for' [overturning those orders]." *Miller* v. *Bolger*, 802 F.2d 660, 666 (3d Cir.

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1 *Accord, e.g., Simon* v. *G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987) ("the nature and scope of our review are not rigidly determined by the certified questions"); *Miller* v. *Bolger*, 802 F.2d 660, 666 (3d Cir. 1986); *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983 n.16 (5th Cir. 1985).

1986), *quoting Struble* v. *New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 336 n.10 (3d Cir. 1984).

Accepting respondents' restrictive view of the power of a Court of Appeals on a § 1292(b) appeal would place appellate courts in the untenable position of rendering advisory opinions on questions that may not be material to a proper review of the order before the court. To quote again from Judge Easterbrook:

> "Were things otherwise, there would be a substantial risk of producing an advisory opinion. If nothing turns on the answer to the question, it ought not be answered; on the other hand, once the interlocutory appeal has been accepted and the case fully briefed, it may be possible to decide the validity of the order without regard to the question that promoted the appeal." *Edwardsville National Bank*, *supra*, 808 F.2d at 651.

Respondents' position would also undermine this Court's acknowledged plenary authority to "reach back and correct errors in the interlocutory proceedings below, even though no attempt was made to secure review of the interlocutory decree or even though such an attempt was made without success." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.2 (6th ed. 1986); *see* Brief in Oppos., pp. 6-7. Respondents advance no basis to conclude that the legal issues raised in the instant petition are not ripe for review at this time, or that any further light on those issues will be shed by inevitably protracted Phase II backpay hearings premised on findings of liability inconsistent with this Court's controlling decisions.

2. Aside from raising this purported jurisdictional barrier to review, respondents are driven to recharacterize the ruling below in order to square the Eleventh Circuit's holding with *Wards Cove*. It would surely come as a surprise to the judges on that panel that their insistence that "[t]he burden—not just of production but of persuasion—was then on Pullman to show that the practice challenged arose from a non-discriminatory business necessity," *Larkin* v. *Pullman-Standard*, 854 F.2d 1549, 1580 (11th Cir. 1988) (*Swint XI*), *pet. for cert. filed sub*

nom. Pullman-Standard v. *Swint*, 57 U.S.L.W. 3670 (U.S. March 31, 1989) (Nos. 88-1601, 1602) (App.53a) was mere "dictum," and that they were really holding "that petitioner had failed to meet its burden of *production*." (Brief in Oppos., p.8; emphasis in original). One also searches in vain for the faintest recognition by the appeals court that plaintiffs cannot simply level an attack on the "bottom line" results of a subjective selection system but, rather, must meet a "specific causation requirement"—"a demonstration that specific elements of the [petitioner's selection] process have a significantly disparate impact on nonwhites." *Wards Cove* v. *Atonio*, *supra*, 109 S. Ct. at 2125.

3. As for the response to petitioner's *Falcon*-class representative standing argument, respondents' suggestion of mootness is illusory. The Court of Appeals, in reviewing the final judgment entered against respondents on the initial assignment claim, essentially revived petitioner's liability on that claim by enlarging the liability period. That court then proceeded to consider, and reject, petitioner's *Falcon* and constitutional standing objections. Those objections were properly before the Eleventh Circuit and they are properly before this Court.

Respondents also mischaracterize petitioner's position as a wholesale attack on Rule 23 itself. Far from that, it is simply petitioner's view that *Falcon* and Article III require that at the point of certification, the class representatives' personal claims correspond to the claims they are asserting on behalf of the class. Such correspondence—essential to ensuring that the named plaintiffs will fairly and adequately represent the interests of the class—was absent here. Respondents' discussion (Brief in Oppos., p. 16) fails to grapple with the fact that, *at the time of certification*, the named plaintiffs had no personal claim of initial assignment discrimination because they were hired either before the enactment of Title VII or before the beginning of the relevant liability period.[2] The lesson appar-

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2 The named plaintiffs also had no personal stake in the supervisory selection claim because they never alleged an individual claim of discriminatory denial of a supervisory promotion, and indeed respondent Swint had actively encouraged black employees to reject offers of promotion to supervisor. *See* Petition at 4 n.8.

ently emerging from the Eleventh Circuit is that *Falcon*'s strictures against "across-the-board" certification may be readily evaded by attaching to a seniority system challenge objections to a host of other employment practices—as to which the named plaintiffs have no personal complaint—that somehow may impact on seniority entitlements.

4. Finally, concerning petitioner's *Owens* v. *Okure* argument, it is misleading to suggest that this issue is of limited practical significance. If the applicable statute of limitations governing the § 1981 claim provides for a one-year period, petitioner will face *no* liability on that claim—and thus no spectre of compensatory and punitive damages—because the complaint in this case was filed more than one year after any initial assignment discrimination was found to have ended.

Respondents' suggestion of waiver is similarly unfounded. Petitioner's answer raised the defense of statute of limitations.[3] This was plainly understood by the District Court in its pre-trial order to be a defense "based upon applicable statutes of limitation." Joint App., p. 30 in Nos. 80-1190 & 80-1193, *Pullman-Standard* v. *Swint* (*Swint VII*) 456 U.S. 273 (1982). In the District Court's view, a one-year statute of limitations "was incorporated into the class definition in the pretrial order" (*Swint X*, *supra*, at 2) (App. 280a), obviating any need on petitioner's part to amend its answer. Given the extensive consideration of the various statutes of limitations proposed by both sides in this litigation, and the Court of Appeals' reluctance to rest its decision on grounds of waiver, this Court is certainly

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3 This is not a case where a defendant fails to raise the issue of statute of limitations at all. Hence the treatise citations in the opposition brief (Brief in Oppos., p. 23 n. 13) appear inapposite. *See*, *e.g.*, *Santos* v. *District Council of United Brotherhood of Carpenters*, 619 F.2d 963, 967 (2d Cir. 1980), citing *Reconstruction Finance Corp.* v. *Tuolome Gold Dredging Corp.*, 137 F. Supp. 855, 862 (N.D. Cal. 1953), *aff'd*, 230 F.2d 479 (9th Cir.), *cert. denied*, 352 U.S. 832 (1956); *Gobla* v. *Crestwood School Dist.*, 628 F. Supp. 43, 46 (M.D. Pa. 1985), *aff'd*, 804 F.2d 1248 (3d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987). Respondents here were placed on notice throughout the litigation that petitioner was challenging their compliance with the applicable statute of limitations.

free to consider the plainly important question of the retroactive effect of *Owens* v. *Okure*.

CONCLUSION

For all the foregoing reasons and those stated in our initial papers, petitioner respectfully requests that its petition be granted or, in the alternative, that the judgment of the Court of Appeals be vacated and the case remanded for reconsideration in light of *Wards Cove*, *Owens* v. *Okure* and *Patterson*.[4]

Respectfully submitted,

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4 The petition was filed before this Court's decision in *Patterson*, and hence does not take account of that decision. Petitioner submits, however, that the Court of Appeals' affirmation of Pullman's liability under § 1981 raises the question whether discrimination in initial departmental assignments is actionable in any event under that statute, "which covers only conduct at the initial formation of the contract. . . ." *Patterson* v. *McLean Credit Union*, *supra*, 109 S. Ct. at 2374.